No. 211

Office ... Clerk

In the

United States Court of Appeals

For the Seventh Circuit

No. 12169

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff-Appellant, vs. **CHICAGO UNION STATION COMPANY,** Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Trial Judge.

APPENDIX

HARRY OKIN
CECIL E. MAGID
7 So. Dearborn St.
Chicago 3, Illinois
Attorneys for Plaintiff-Appellant

JAMES P. CHAPMAN
and
WEISSENBACH, HARTMAN, CRAIG, OKIN & MAGID
Of Counsel

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APPENDIX

1A

IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—Civil Action No. 56 C 1438)

STATEMENT REQUIRED PURSUANT TO RULE 12 (c) OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. This action was commenced on the 27th day of August, 1956.

2. The names of the original parties to the action are St. Paul Fire and Marine Insurance Company, Plaintiff, and Chicago Union Station Company, Defendant. There have been no changes or substitutions.

3. The following pleadings have been filed:

a) Complaint, 8-27-56
b) Defendant's Answer, 9-19-56
c) Plaintiff's Request for Admission of Facts, 5-31-57
d) Defendant's Response to Plaintiff's Request for Admission of Facts, 4-12-57

4. Trial was commenced before Judge John P. Barnes, without a jury, on June 5, 1957, and concluded before him on June 7, 1957.

5. Judgment was entered in favor of Defendant on June 18, 1957 dismissing the action at Plaintiff's costs. Motions to set aside findings of fact, conclusions of law and judgment order in favor of Defendant, and to make findings of fact and conclusions of law and to enter

2A judgment in favor of Plaintiff, or in the alternative for a new trial, were denied, 9/11/57.

6. Appeal was taken by Plaintiff by filing of Notice of Appeal, 9/26/57.

.....

Cecil E. Magid, of the firm of
Weissenbach, Hartman, Craig & Okin
7 South Dearborn Street,
Randolph 6-1805
Attorneys for Plaintiff-Appellant
Erwin W. Roemer, and
P. J. Cronin,
33 So. Clark Street,
Chicago 3, Illinois
Attorneys for Defendant

3A Placita.

4A

IN UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 1438) * *

Complaint filed August 27, 1956 as follows:

Now comes plaintiff, St. Paul Fire And Marine Insurance Company, by Harry Okin, of the firm of Weissenbach, Hartman, Craig & Okin, and for its claim against defendant, Chicago Union Station Company, states as follows:

1. Plaintiff is a corporation incorporated under the laws of the State of Minnesota, and defendant is a corporation incorporated under the laws of the State of Illinois. That the amount in controversy exclusive of interest and costs, exceeds the sum of $3,000.00.

2. Defendant at all times hereinafter mentioned, owned, controlled and operated a railroad passenger station, commonly known as the "Union Station" located at Canal, Adams and Jackson Streets, in the City of Chicago,

5A Illinois. That in the operation of said Union Station the defendant, by and through its employees, agents

and servants, commonly referred to and designated by defendant as "Red Caps", solicits the handling of baggage carried by members of the public boarding and leaving trains at said Union Station, for a consideration in money.

3. That plaintiff is an insurance company duly authorized to do business in the State of Illinois; that on the 11th day of September, 1955, there were in full force and effect three certain policies of insurance theretofore issued by plaintiff respectively to Hyman Ostrow and Morris Samit, doing business as Ostrow and Samit, bearing number JB05-8299; Samuel Abramson, bearing number JB05-8034, and to Harry L. Mintz, bearing number JB05-7458; that the above-named persons were engaged in the jewelry business, and the above described policies were issued by plaintiff to them respectively as aforesaid insuring against loss of their respective stocks in trade consisting of items of gold and platinum jewelry, rings, watches, diamonds and other precious and semi-precious stones.

4. That on said September 11th, 1955, the said Harry L. Mintz, one of plaintiff's assureds, as aforesaid, in addition to being engaged in business as a jewelry jobber in his own behalf, was employed as a salesman by Ostrow and Samit and Samuel Abramson, plaintiff's other assureds, as aforesaid, on said date, and had in his lawful possession merchandise of the kind described in paragraph 3 above, owned by himself and the said Ostrow and Samit, and Samuel Abramson, of the value as follows:

6A

Harry L. Mintz	$ 6,525.21
Ostrow and Samit	10,884.67
Samuel Abramson	17,196.00
aggregating	$34,605.88

5. That on said September 11th, 1955, the said Harry L. Mintz arrived at the said Union Station operated by defendant, as aforesaid, for the purpose of boarding a railroad train to Minneapolis, Minnesota, on line commonly known as the Burlington Route, operating out of said Union Station; that at said time and place said Harry L. Mintz had in his possession two (2) jewelry sample cases, containing the merchandise hereinabove described of the aggregate value of $34,605.08, as aforesaid, together with a travelling bag containing personal effects and clothing belonging to him.

6. That on said September 11th, 1955, at said Union Station, defendant had in its employ one R. C. Retting, designated by defendant as "Red Cap 71"; that said "Red Cap 71", at the time and place aforesaid acting in the regular course of his duties as defendant's agent, servant and employee, did solicit the handling, for a consideration in money, of said two sample cases and travelling bag then and there carried by said Harry L. Mintz and then and there containing the merchandise of the kind and value as aforesaid.

7A 7. That the said Harry L. Mintz on said date, and at said time and place, at the request of defendant through its said employee "Red Cap 71", delivered to said defendant the two sample cases containing the merchandise of the value of $34,605.88 as aforesaid and the travelling bag then and there carried by said Harry L. Mintz, to be taken care of by said defendant, through its said employees, and to be returned to said Harry L. Mintz aboard the train to Minneapolis, Minnesota, as aforesaid; that in consideration thereof and in consideration of the monetary charge required to be paid to defendant by said Harry L. Mintz, as aforesaid, the defendant, through its employee "Red Cap 71", at said time and place, took possession of said sample cases and bag and agreed to return them to him aboard the train aforesaid.

before the said train left said Union Station; that at the time of the delivery of said cases and bag to defendant as aforesaid, the defendant, through its said employee issued to said Harry L. Mintz three (3) claim checks, one for each of said cases and bag, which checks were to be surrendered to said employee at the time of the return of said cases and bag to Harry L. Mintz; that defendant, did not return said sample cases and bag to Harry L. Mintz, as it undertook to do, but on the contrary the same were never returned to him or to any or either of plaintiff's assureds, and thereby the plaintiff and its assureds suffered a loss in the amount of $34,605.88.

8A 8. That thereafter, the plaintiff's assureds, to-wit, Hyman Ostrow and Morris Samit, doing business as Ostrow and Samit, Samuel Abramson and Harry L. Mintz made their respective claims against the plaintiff herein under the insurance policies hereinabove described for the loss of the said merchandise owned by each of them, and the plaintiff made payments to them for the loss thereof as it was required to do under the said insurance policies issued by it as aforesaid in the following amounts; to-wit:

To—Ostrow and Samit	$10,884.67
To—Samuel Abramson	17,196.00
To—Harry L. Mintz	6,525.21
Total	$34,605.88

That the plaintiff then and there became subrogated to the rights of its above-named assureds in and to the merchandise above described, in the amounts which it paid to them respectively, in consideration of which and pursuant to the terms of said insurance policies, the said assureds, on the 5th day of October, 1955, the 19th day of October, 1955, and the 10th day of November, 1955, respectively, assigned and transferred to plaintiff as said-

rogee, all of their claims and damages arising out of the loss of said merchandise; and the plaintiff, St, Paul Fire And Marine Insurance Company, as such subrogee, then and there became the actual bona fide subrogee, as aforesaid.

9A 9. That plaintiff, as subrogee, as aforesaid of its above-named assureds, has demanded the return of said merchandise, or the value thereof, to-wit, $34,605.88, which defendant, Chicago Union Station Company has failed and refused, and still persists in refusing to do, to plaintiff's damage in the sum of $34,605.88.

Wherefore, plaintiff, as subrogee, demands judgment against Chicago Union Station Company in the sum of $34,605.88, together with costs.

St. Paul Fire And Marine Insurance Company
By Harry Okin
of the firm of Weissenbach, Hartman, Craig & Okin, its attorneys.

Weissenbach, Hartman, Craig & Okin
7 South Dearborn Street
Suite 1630
Chicago 3, Illinois
RAndolph 6-1805

10A

IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—No. 56 C 1438)

Answer filed September 19, 1956 as follows:

Answering the complaint, defendant, The Chicago Union Station Company, a corporation, says:

1. It admits the averments of paragraph 1.

2. It admits that on September 11, 1955, it owned, controlled and operated a railroad passenger station, com-

monly known as the "Union Station" located at Canal, Adams and Jackson Streets, in the City of Chicago, Illinois. It denies that in the operation of said Union Station it, by and through its employees, agents and servants, commonly referred to and designated by defendant as "Red Caps", solicits the handling of baggage carried by members of the public boarding and leaving trains at said Union Station, for a consideration in money, but says that as part of its operation of said station through its servants designated as Red Caps, it offers as a service to the public the handling of personal luggage for a nominal charge.

3. It does not have information or knowledge sufficient to form a belief as to the truth of the averments of paragraph 3.

4. It does not have information or knowledge 11A to form a belief as to the truth of the averments of paragraph 4.

5. It does not have information or knowledge sufficient to form a belief as to the truth of the averments of paragraph 5.

6. It admits that on September 12, 1955, it had in its employ one R. C. Rettig, whose designation was Red Cap #71; and that said Red Cap offered his services to carry the personal baggage of said Harry L. Mintz for the usual charge: It does not have information or knowledge sufficient to form a belief as to the truth of the remaining averments of paragraph 6.

7. It denies the averments of paragraph 7.

8. It does not have information or knowledge sufficient to form a belief as to the truth of the averments of paragraph 8.

9. It denies the averments of paragraph 9.

10. Defendant for its affirmative defense alleges that at no time did said Harry Mintz or any other party on behalf of plaintiff notify it of the contents of said three pieces of baggage or the value thereof; that had it or its agents been informed of the contents of said three pieces of baggage, it would have refused to accept them and would have advised said Harry Mintz to make other arrangements for their handling and custody.

11. For its further affirmative defense it alleges plaintiff, through its insured, Harry Mintz, was guilty of negligence that caused said loss by delivering said three pieces of baggage to its agent without informing him as to the contents and value thereof, and for not taking proper steps to protect said three pieces of baggage after releasing them to the custody of its said agent when he was in possession of knowledge as to the value of the contents thereof.

The Chicago Union Station Company
Defendant

By

Robert H. Bierma
P. J. Cronin,
Its Attorneys

652 Union Station
Chicago 6, Illinois
CEntral 6-7200 Ext. 608

PROOF OF SERVICE

I hereby certify that I have this day served the foregoing answer upon said plaintiff by mailing, by first-class mail, a copy thereof to his attorney of record at the address appearing on the complaint.

Dated at Chicago, Ill. this 19th day of September, 1956.

P. J. Cronin
One of the attorneys
for defendant

13A

UNITED STATES DISTRICT COURT

(Caption—No. 56 C 1438)

Request For Admission Of Facts filed May 31, 1957 as follows:

To: P. J. Cronin and
Erwin W. Roemer
33 S. Clark Street
Attorneys for Defendant

Please take notice that the plaintiff hereby requests the defendant, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit within 10 days after service of this request, for the purposes of the above entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. That on September 11, 1955, defendant, Chicago Union Station Company, an Illinois corporation, owned, controlled and operated certain premises in the City of Chicago, Illinois, located at Canal, Adams and Jackson Streets, commonly known as the "Union Station".

14A 2. That on September 11, 1955, defendant employed certain persons, designated by it as "Red Caps", whose duties were to receive travelling bags of various kinds, from the travelling public, containing personal property, and to carry or otherwise transport the same in and upon defendant's premises, to and from various railroad trains arriving at, and departing from the defendant's Station, for which services a charge of 25¢ per bag was made.

3. That on September 11, 1955, one, Raymond C. Rettig, was in the employ of defendant as "Red Cap" No. 71; that on said date, said Raymond C. Rettig, as "Red Cap" No. 71, received into his possession from one, Harry

L. Mintz, three (3) bags, described as two sample cases, one with wheels, and a brown two-suiter bag, to be re-delivered to him aboard a train which was to depart from said Station for Minneapolis, Minnesota.

4. That defendant's said employee, upon receiving the three (3) bags from said Harry L. Mintz, described in, and at the time and for the purposes set forth in paragraph 3 above, said employee attached a separate identification tag to each of said three (3) bags, each containing a separate number, and tore off from each thereof a stub, containing the identical numbers as those remaining attached to said bags, and delivered said stubs to Harry L. Mintz, which said identification tags and the said stubs torn therefrom bore numbers 792319, 792320, and 792321, respectively, which said stubs, pursuant to instructions of defendant to its said employee, were required to be 15A surrendered by said Harry L. Mintz to said "Red Cap", as a condition to receiving re-delivery of said three (3) bags.

5. That on said date, to wit: September 11, 1955, without requiring surrender of the stubs, described in paragraph 4 above, and without having received authority therefor from said Harry L. Mintz, said "Red Cap" No. 71, at the request of a stranger, picked up the three (3) bags, theretofore received from Harry L. Mintz, and carried them out to the station cab court and placed the black sample case with the wheels in the loading part of a Yellow Cab, next to the driver, and helped the stranger with the other bags into the passenger part of said Yellow Cab.

6. That the said three (3) bags, described in paragraph 3 above, so delivered to "Red Cap" No. 71, by said Harry L. Mintz, were never re-delivered to him.

7. That the plaintiff, St. Paul Fire & Marine Insurance Company, is an insurance company duly authorized to do business in the State of Illinois.

8. That on the 11th day of September, 1955, there were in existence the following numbered insurance policies theretofore issued by plaintiff to the persons whose names are set opposite each of them, and that said policies were in full force and effect on said date, to-wit:

Policy number	Assured
JB05-8299	Hyman Ostrow and Morris Samit d/b/a Ostrow & Samit
JB05-8034	Samuel Abramson
JB05-7458	Harry L. Mintz

16A 9. That under said policies plaintiff insured the above named persons against loss of their respective stocks-in-trade, consisting of items of gold, platinum, jewelry, rings, watches, diamonds and other precious and semi-precious gems.

10. That on said September 11, 1955, property of the types described in paragraph 9 above, belonging to the persons named in paragraph 8 above, was contained in the two (2) sample cases brought to defendant's premises by Harry L. Mintz, and by him delivered to defendant's employee, Raymond C. Rettig, as "Red Cap" No. 71, for the purposes and under the circumstances set forth in paragraphs 3 and 4 above.

11. That plaintiff, pursuant to claims made against it by its assureds named in paragraph 8 above, for the loss of merchandise owned by them respectively, and covered by the insurance policies described in said paragraph 8, which merchandise was contained in the two (2) sample cases delivered to defendant's said employee, "Red Cap" No. 71, paid to said assureds the sums set opposite their respective names, to-wit:

Name of Assured	Amount paid
Ostrow & Samit	$10,884.67
Samuel Abramson	17,196.00
Harry L. Mintz	6,525.21
Total	$34,605.88;

that said payments are evidenced by photostatic copies of the checks issued by plaintiff to its said assureds, which copies are attached hereto; defendant is requested to admit the genuineness of said checks within the time hereinabove set forth.

12. That plaintiff, St. Paul Fire & Marine Insurance Company, is the actual bona fide subrogee of its assureds named in paragraph 8 above, for the amounts set forth in paragraph 11 above, paid to each of them respectfully, for the losses sustained by them on September 11, 1955, of their respective stocks-in-trade as described and set forth in paragraphs 9 and 10 above, as evidenced by photostatic copies of Assignments executed by said assureds which are attached hereto and made a part hereof; defendant is requested to admit the genuineness of said assignments within the time hereinabove set forth

/s/ .....
Harry Okin, of the firm of
Weissenbach, Hartman, Craig & Okin
7 S. Dearborn Street
Chicago 3, Illinois
Attorneys for Plaintiff

Received a copy of the foregoing request for Admissions of Fact and Genuineness of Documents this 4th day of April, 1957:

/s/ Erwin W. Roemer
/s/ P. J. Cronin
Attorneys for Defendant

18A

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 56 C 1438) • •

Response Of Defendant To The Request Of Plaintiff For Defendant To Admit Certain Facts, Filed April 12, 1957 as follows:

Defendant hereby makes the following response to the request of plaintiff for admission of the following alleged facts:

1. That on September 11, 1955, defendant, Chicago Union Station Company, an Illinois corporation, owned, controlled and operated certain premises in the City of Chicago, Illinois, located at Canal, Adams and Jackson Streets, commonly known as the "Union Station".

Answer: Admitted.

2. That on September 11, 1955, defendant employed certain persons, designated by it as "Red Caps", whose duties were to receive travelling bags of various kinds, from the travelling public, containing personal property, and to carry or otherwise transport the same in and upon defendant's premises, to and from various railroad trains arriving at, and departing from the defendant's Station, for which services a charge of 25¢ per bag was made.

19A Answer:

Admits that on September 11, 1955, defendant, as agent of the four railroad companies who operate out of the said Union Station, ~~employed so-called~~ "Red Caps", whose duties were to receive bags of various kinds from the travelling public containing personal property, and to carry or otherwise transport the same in the said Union Station to and from various railroad trains arriving at and departing from the said Union Station, and that the usual charge for such services was at the rate of 25¢ per bag.

3. That on September 11, 1955, one, Raymond C. Rettig, was in the employ of defendant as Red Cap No. 71; that on said date, said Raymond C. Rettig, as Red Cap No. 71, received into his possession from one, Harry L. Mintz, three (3) bags, described as two sample cases, one with wheels, and a brown two-suiter bag, to be re-delivered to him aboard a train which was to depart from said Station for Minneapolis, Minnesota.

Answer:

Admits that on September 11, 1955, Raymond C. Rettig was in the employ of defendant as Red Cap No. 71; that on said date said Raymond C. Rettig received into his possession from a traveller whom he later learned to be one Harry L. Mintz, three bags. Admits that the said Raymond C. Rettig described two of these bags as black sample-type cases made of fibreboard, which the said Rettig said are used by salesmen, students for the 20A purpose of carrying laundry, and by different persons for all purposes. Admits that the said Raymond C. Rettig reported that one of these bags had wheels at the bottom and that the top portion of the said bag had a hard handle; and that the third bag was a brown two-suiter. Admits that these three bags were to be re-delivered to the said Harry L. Mintz on board a Burlington train which was about to depart from said Station for Minneapolis, Minnesota.

4. That defendant's said employee, upon receiving the three (3) bags from said Harry L. Mintz, described in, and at the time and for the purposes set forth in paragraph 3 above, said employee attached a separate identification tag to each of said three (3) bags, each containing a separate number, and tore off from each thereof a stub, containing the identical numbers as those remaining attached to said bags, and delivered said stubs to Harry L. Mintz, which said identification tags and the said

stubs torn therefrom bore numbers 792319, 792320 and 792321, respectively, which said stubs, pursuant to instructions of defendant to its said employee, were required to be surrendered by said Harry L. Mintz to said Red Cap, as a condition to receiving re-delivery of said three (3) bags.

Answer:

Admits that the said Raymond C. Rettig upon receiving the said three bags from the said Harry L. Mintz
21A attached a separate identification tag to each of the said three bags, each containing a separate number, and tore off from each a stub containing the identical numbers as those remaining attached to the said bags, and delivered the said stubs to Harry L. Mintz, and that the said stubs bore numbers 792319, 792320 and 792321, respectively. Admits that defendant had instructed the said employee not to redeliver baggage to owners without the surrender of the stubs.

5. That on said date, to-wit: September 11, 1955, without requiring surrender of the stubs described in paragraph 4 above, and without having received authority therefor from said Harry L. Mintz, said Red Cap No. 71, at the request of a stranger, picked up the three (3) bags theretofore received from Harry L. Mintz, and carried them out to the Station cab court and placed the black sample case with the wheels in the loading part of a Yellow Cab, next to the driver, and helped the stranger with the other bags into the passenger part of said Yellow Cab.

Answer:

Admits that on said date the said Raymond C. Rettig, without requiring the surrender of the said stubs and without having received authority therefor from the said

Harry L. Mintz, at the request of a stranger carried the said three bags to the Station taxicab court and placed the black sample-type case with the wheels in the loading part of a cab next to the driver, and helped the said
22A stranger place the other two bags in the passenger part of the said Yellow cab.

6. That the said three (3) bags, described in paragraph 3 above, so delivered to Red Cap No. 71, by said Harry L. Mintz, were never re-delivered to him.

Answer:

While defendant has no knowledge with respect thereto, it says that so far as any information has come to it, the said three bags so delivered to the said Raymond C. Rettig by the said Harry L. Mintz were never re-delivered to him.

7. That the plaintiff, St. Paul Fire & Marine Insurance Company is an insurance company duly authorized to do business in the State of Illinois.

Answer:

While defendant has no knowledge or information with respect to these alleged facts, for the purpose of this law suit it is willing to admit that plaintiff is an insurance company authorized to do business in the State of Illinois.

8. That on the 11th day of September, 1955, there were in existence the following numbered insurance policies theretofore issued by plaintiff to the persons whose names are set opposite each of them, and that said policies were in full force and effect on said date, to-wit:

Policy Number	Assured
JB05-8299	Hyman Ostrow and Morris Samit d/b/a Ostrow & Samit
JB05-8034	Samuel Abramson
JB05-7458	Harry L. Mintz

23A Answer:

While the defendant has no knowledge with respect to the facts alleged in the preceding paragraph, for the purpose of this law suit it is willing to admit that there were in existence the insurance policies described in said paragraph, and that said policies were in full force and effect on said date.

9. That under said policies plaintiff insured the above named persons against loss of their respective stocks-in-trade, consisting of items of gold, platinum, jewelry, rings, watches, diamonds and other precious and semi-precious gems.

Answer:

While the defendant has no knowledge with respect to the facts alleged in the preceding paragraph, for the purpose of this law suit it is willing to admit that the said insurance policies insured the said named persons against the loss of the items of gold, platinum, jewelry, rings, watches, diamonds and other precious and semi-precious gems described in the said paragraph.

10. That on said September 11, 1955, property of the types described in paragraph 9 above, belonging to the persons named in paragraph 8 above, was contained in the two (2) sample cases brought to defendant's premises by Harry L. Mintz, and by him delivered to defendant's employee, Raymond C. Rettig, as Red Cap No. 71, for the purposes and under the circumstances set forth in paragraphs 3 and 4 above.

24A Answer:

Defendant has no knowledge or information sufficient to form a belief as to whether or not the said two sample-type cases contained the items described in paragraph 9 above.

11. That plaintiff, pursuant to claims made against it by its assureds named in paragraph 8 above, for the loss of merchandise owned by them respectively, and covered by the insurance policies described in said paragraph 8, which merchandise was contained in the two (2) sample cases delivered to defendant's said employee, Red Cap No. 71, paid to said assureds the sums set opposite their respective names, to-wit:

Ostrow & Samit	$10,884.67
Samuel Abramson	17,196.00
Harry L. Mintz	6,525.21
Total	$34,605.88;

that said payments are evidenced by photostatic copies of the checks issued by plaintiff to its said assureds, which copies are attached hereto; defendant is requested to admit the genuineness of said within the time hereinabove set forth.

Answer:

Defendant admits that it has had exhibited to it by plaintiff photostatic copies of:

1. release and subrogation receipt signed by Harry L. Mintz, acknowledging the payment to him of $6525.21 by the plaintiff;

2. check of plaintiff made payable to Hyman Ostrow and Morris Samit in the amount of $10,884.67; and

25A 3. check of plaintiff made payable to Samuel Abramson in the amount of $17,196.00. For the purpose of this law suit defendant is willing to accept the said photostatic checks as evidence of the payments by plaintiff to the persons named in paragraph 11.

12. That plaintiff St. Paul Fire & Marine Insurance Company is the actual bona fide subrogee of its assureds

named in paragraph 8 above, for the amounts set forth in paragraph 11 above, paid to each of them respectfully, for the losses sustained by them on September 11, 1955, of their respective stocks-in-trade as described and set forth in paragraphs 9 and 10 above, as evidenced by photostatic copies of Assignments executed by said assureds which are attached hereto and made a part hereof; defendant is requested to admit the genuineness of said Assignments within the time hereinabove set forth.

Answer:

For the purposes of this law suit defendant accepts the photostatic copy of the release and subrogation agreement as evidence that plaintiff is the actual bona fide subrogee of the assureds for the amounts set forth in Paragraph 11.

Chicago Union Station Company
By /s/ J. E. Shiffer
Assistant General Manager

26A-33A * * *

1

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 1438) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, Chief Judge of said Court, in his court room in the United States Court House at Chicago, Illinois, beginning on Wednesday, June 5, 1957, at 2:00 o'clock p. m.

Appearances:

Cecil E. Magid, Esq.,
Of Weissenbach, Hartman, Craig & Okin
(Suite 1630, 7 South Dearborn St.,
Chicago 3, Ill.),
on behalf of Plaintiff;

Edwin W. Roemer, Esq.,
Of Gardner, Carton, Douglas, Roemer & Chilgren
(Suite 1430, 33 S. Clark St., Chicago 3, Ill.),
on behalf of **Defendant.**

2-24 * * *

25 Mr. Magid: I would like to offer the request for admissions submitted to the defendant and the response of the defendant to the request.

26 The Court: Any objection?

Mr. Magid: And make that a part of the record in the case.

The Court: Any objection?

Mr. Roemer: No, your Honor.

The Court: They may be received. (Thereupon the above-mentioned papers were received in evidence, and are as set forth at pages 9-20 above.)

HARRY L. MINTZ called as a witness on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Magid.

27 My name is Harry L. Mintz. I reside at 6302 North Sacramento, Chicago. My occupation is wholesale jeweler on my own account and I represent several manufacturing jewelers. I represent Samuel Abramson, S & D Jewelry Manufacturing Company, Ostrow and Samit, K & S Jewelry Company, who are all located in New York City. The bulk of the merchandise which I offer for sale as a wholesale jeweler is diamond watches I have assembled. In addition I buy odds and ends of rings, which I also offer for sale on my own account.

28 I sell to retail stores and wholesalers. The merchandise which I offer for sale for Ostrow & Samit consists of platinum engraved rings, some set with dia-

monds on the side, wedding rings, fully set, and blank cocktail rings with no stones of any kind. Samuel Abramson line consists of gem mountings, some semi-set, Linde star sapphires, ladies' cocktail rings and cocktail rings containing synthetic sapphires, and blank mountings, and there were a dozen semi-mounted rings.

29 S & D Jewelry Manufacturing Company line consisted of platinum and gold watch-cases, no diamonds, no movements.

30 K & S Jewelry Company line consisted of two trays of earring mountings, cultured pearl earrings and a tray of religious goods. The watch cases were 14 karat gold, as were the ring mountings of Samuel Abramson line.

On my own account I buy watch, and movements, from various sources and have them set onto a completed watch. I did that with some rings also, and some merchandise I bought complete.

31 Samuel Abramson, S & D and K & S were sample lines from which I took orders, and which were made up to customers' specifications. On the Ostrow and Samit line I was permitted to deliver semi-mounted merchandise. I obtained my lines either by going to New York to pick them up or they were shipped to me. I keep records of merchandise on hand for my own account and for the account of the other concerns I represent.

32 I have these records with me.

My looseleaf binder which I handed you is a stock book of the watches I made up. These entries were made after the watch was completed, from bill and invoices, order shows the cost of the case, the cost of the movement and the cost of the diamonds, and they are numbered. This record goes back to about 1952 to date. This book is the record of all of my property which I offer

33 for sale on my own account, with exception of some

items which are not entered but for which I have invoices. This stock book is my record kept in the ordinary course of my business and the entries made by me.

(Said exhibit was marked plaintiff's Exhibit 1, for identification.)

The number of pages of ruled paper on which is printed the word "Inventory" contains the inventory which I
34 take semi-annually, for the purpose of finding out my worth and for insurance purposes. In the main the information contained in this inventory is also in the stock book, with the exception of eleven 14 karat religious charms which are not entered into the stock book, there are also three 14 karat gold bracelet watches which are not in the stock book.

35 Loose diamonds are not kept in the stock book; there is a supplemental record for those. This inventory is kept in the ordinary course of my business, and is made up and kept by me.

(This exhibit was marked plaintiff's group Exhibit 2, for identification.)

36 The loose-leaf binder which you now show me contains entries made from original memorandum of sample lines received by me, which I signed and returned to the companies. This record was kept in my office. The duplicates of the originals were carried in my bags so that I would be able to trace an item in case a price tag fell off, and replace the tag with the right price.

37 The first four pages of this record contains the Samuel Abramson line which I picked up in January, 1955. I made records of these lines every year, when I got the new line I would destroy the record of the old one. The entries in this record were copied directly from the duplicates sent me by Samuel Abramson.

38 The duplicates from which these entries were made

were in my personal grip which was lost. This loose-leaf folder also contains the record of the 1957 Samuel Abramson sample line.

39-40 * * *

41 The Ostrow & Samit line is also contained in this inventory book and was made in the same way, from the duplicate memos.

* * *

42 The circles indicate rings I had delivered from the sample line. These were sold prior to September 11, 1955. This record was kept in my own handwriting, under my direct supervision and are kept in the ordinary course of my business.

43 (This exhibit was marked Plaintiff's Exhibit 5 for identification)

Mr. Magid: I would like to offer plaintiff's exhibits 1 to 5 for identification in evidence. Do you care to look at these Mr. Roemer?

Mr. Roemer: I have not seen them.

44-48 * * * (Exhibits handed to Counsel)

* * *

Cross Examination by Mr. Roemer.

* * *

49 Exhibit number 5 has the date 1955 on it. These entries were usually started in January. There is no other indication of when it was started. The first pages in this book are a copy of the Samuel Abramson sample line. There are no circles around any of the items. Some are crossed off.

50 The crossed off items were probably returned. They weren't sold.

In the same exhibit appear the items under the heading "Ostrow & Samit's" line. I put the year there. The circle-

in this case indicates sales. The record does not show when the sales were made, my order book would show that.

51. The only date on this part is January, 1955. The reverse sides of the sheets do not contain dates. This book also contains the S & D account. There was no sale of any single item from the S & D line.

52 Each item is described by style number and sales price. The date of the last item on this book is 1955. It was all got at the same time in January of 1955. I made plenty of sales from orders from these items. I didn't deliver those.

53 Mr. Roemer: At this time I object to them if Your Honor please, because they have no relevance in this case as yet. It may possibly become material, but not at this time.

Direct Examination Continued by Mr. Magid.

Exhibit 1, the stock book was started in 1951 or
54 1952. This record superseded a previous record. The items which are crossed off are the ones which were sold. The items which are not crossed off are not necessarily in my possession. They may be out on memorandum, but they are my property, and I have a record of it.

55 The entries of the purchases I made of the various components and the cost of the manufacture were entered in this book from invoices after the thing was completed.

Plaintiff's Exhibit 2 was made on June 25, 1955 and June 27, 1955. This information came from a physical inventory which I took. I take such inventory twice a year.

56 I have similar inventories from other years in my office. When I take the inventory it indicates exactly

what I had on hand at that time. I sometimes make entries on the inventory after it is taken. When something is sold I may check it off and the next time I might forget.

57 In the stock book there is a permanent record of the items I sell. They are crossed off. The items not crossed off indicate what I have on hand at any particular time of the year.

58 • • •

59 At the time I made the entries in Exhibit number 5 I had all of the merchandise to which the entries relate in my possession.

The several crossed off items in the Samuel Abramson line and the other figures appearing thereafter in-
60 dicate a price change which was made by me. That is true of every other such entry in the Samuel Abramson record. The entries in the Samuel Abramson record marked 1955 were made in January. After I got the line I would make these entries as a double check. As I said, the duplicates of the memoranda received from the company were carried with me in case price tags fell off. The line was fixed so that each ring was in a certain tray—and when customers picked them up it was
61 easier to put them back and just follow the memo. About a dozen out of 400 items in the line were sold. I took orders for the others and the original sample was retained in my possession.

62 The circles around the various entries in the Ostrow & Samit line show that the particular item was delivered. I was permitted to sell from this line. The original entry of this line are in my handwriting and all the items listed were in my possession at the time.

63 Subsequently whenever I sold an item I circled it.

64 On September 11, 1955 I had in my possession all of the items in the Samuel Abramson line as shown

on these sheets. On September 11, 1955 I did not have in my possession all of the items indicated on the sheets marked Ostrow & Samit sample line. The items I did not have were crossed off or circled.

65 The last of the items circled was made prior to September 11, 1955.

On September 10, 1955 I brought my personal

66 effects bag to the office. I cleaned up my line and my trays began stacking the trays. I checked the lines and put the merchandise of all the lines in the vault. I then locked the vault and went home. On September

67 11, 1955 I got to the office about 3:45; I opened the vault and started to pack my bags; as I packed them I opened each tray to see that they were full. I remember there were four extra loose rings in the Ostrow & Samit line, and I think there were two in Samuel Abramson line. After packing the bags I went down stairs and got a cab and loaded the bags with the help of the driver, and proceeded to the Union Station. At the station the driver helped me unload; I looked for a red cap; when I found one he told me to wait. While waiting I unhooked the bag and made two bags out of it.

68 When he was through I told him "Here are three bags to be loaded on the train for Minneapolis," and he gave me three stubs, and I told him to be careful, that they were valuable, and to make sure it doesn't roll off the truck, to put it flat, and he said, "All right; I will claim the checks when you board the train." I gave him a dollar for the three bags. I think he told me "Make sure you have your checks with you, because I will call out the number" and I said, "I know that."

69 I had no other conversation with the red cap other than that I told him to be careful of the bags and that they were valuable and to make sure the one on wheels don't fall off the truck.

(Plaintiff's Exhibits 6, 7 and 8 marked for identification)

The stubs you show me marked plaintiff's Exhibits 6, 7 and 8 were the ones handed to me by the Red Cap at the time.

70 I left the Red Cap and made a call home. I know a secret door through which I went down to the train to avoid waiting for all the people. I noticed a Red Cap and I asked him if he was Red Cap 71. He was busy unloading and didn't answer. I was first to board the train and I made sure I got the rear seat to reserve space for the bags.

71 It was only a few minutes. I asked the porter to see if my bags were on the platform; the man couldn't find it. The train started. It is a replica of that bag (pointing to bag which was exhibited. It is a two-
72 sectional bag with a handle on the lower portion which unhooks. I unhooked the bag to make it easy, because it weighs about 90 pounds. When I delivered these bags to the Red Cap on September 11, 1955 they had in them the cases of trays and cases of jewelry, and my watches and there was another case in which the watch cases were. You will see it on top there.

Mr. Magid: May I demonstrate this, Mr. Roemer.

Witness (continuing): And I had two trays like this.

73 There were about 20 cases. I gave the exact number in my statement. I had two trays containing the watches. This tray was loaded with the watch cases; and I had about twenty trays of ring mountings containing about 30 to a tray, plus the two trays for K & S and a tray of religious goods; and then the Ostrow & Samit line which consisted of half trays, five of semi-mounted and two trays of mounted. There were twenty trays eight by eight containing 30 to 25 items; 2 trays of watches with 16 partitions in a tray; 7 trays of Ostrow &

74 Samit's line and 3 trays of the K & S line, plus the S & D Line. There were no empty spaces in the trays; there were 4 extra mountings in the Ostrow & Samit line that were loose and just put in the tray.

75 The item you show me on the first page of plaintiff's Exhibit 5, marked "Samuel Abramson Sample Line 1955", is a gent's white gold mounting which sold for $18.75. That was the market value to the dealer.

76 It was the wholesale price which I was required to obtain, and is the price for which I sold these items, which is the value of the ring.

77 All the items were taken from the original memorandum which contained the prices I was to sell the merchandise for. I took orders at those prices, and that is true of all the other items in the other lines.

Q. Is that true of the Ostrow & Samit line as well?

A. Yes.

Mr. Roemer: I object to that again, if Your Honor please.

The Court: Sustained.

78-83 * * *

84 Mr. Magid: Q. Do you have a record which you kept in the ordinary course of your business of all

85 the items which were in your sample cases on September 11, 1955.

A. This book is the record of all the merchandise that I received that I had.

Mr. Roemer: I concede that.

Mr. Magid: Is that a record of the merchandise which you had in your bag on September the 11, 1955.

Mr. Roemer: I object to that as leading and suggestive and improper.

The Court: Sustained.

I have no record of the merchandise in my bag on September 11, 1955 other than this. I didn't make out specifically item by item. I know I took the entire line

for Ostrow & Samit, as charged to me. The entire
86 line consisted of 7 trays of rings, five of which were semi-mounted and two trays of blank mountings. I have a record of the particular items and the value thereof in my permanent records kept in the ordinary course of my business. There were over 200 items of the Ostrow & Samit line in my bag on September 11, 1955.

87 • • •

88 Mr. Magid: I offer plaintiff's exhibit No. 5 as evidence . . . as the record kept in the ordinary course of business of plaintiff's assured, Mr. Mintz.

The Court: Any objection?

Colloquy between Court and Counsel.

89-90 • • •

91 The Court: Where was this book kept

Witness: In the office.

The Court: Where?

Witness: 29 E. Madison, Chicago, Illinois.

The Court: When were these entries made?

Witness: In January, the first two weeks of January, 1955.

Mr. Magid: Q. Is that true with respect to all the entries?

A. Yes, when I get the lines.

Q. What about the circles?

A. The circles were made subsequently when I
92 sold the merchandise. It would be between January and September 11.

93-95 • • •

96 The Court: When were these items shown in these Ostrow & Samit line pages? Were they on consignment or samples?

Witness: Samples on which I took orders for and delivered same.

The Court: You need these as samples, and you used them as goods for sale?

Witness: In that particular line.

• • •

The Court: Well, I think this may be received. Were these made in the usual course of business?

Witness: Yes.

The Court: When, with respect to the matters shown by these remarks, was this record made?

• • •

97 Witness: In January, the first two weeks in January, before I start making my trips.

The Court: Was it your course of business to make such records?

Witness: It was.

• • •

The Court: Did you make these records with respect to other person who consigned goods to you?

Witness: Yes.

The Court: I think those two pages are admissible.

98 I made the entries on the first four pages of Exhibit No. 5. They were made for the purpose of keeping a record of the merchandise I had on hand. This record was made in January, 1955, at the time I picked up the line, and the merchandise was in my possession.

99 • • •

100 The merchandise to which these pages refer were in my vault on September 11, 1955 before I started the trip.

101 All this merchandise was put into my sample cases on September 11, 1955 which I checked with the Red Cap at the station.

Mr. Magid: If the Court please, I believe the records

of Samuel Abrahamson as indicated in this plaintiff's Exhibit No. 5, for identification are in the same category as those for Ostrow & Samit, made in the same way and kept in the same way in the ordinary course of his business and are admissible in evidence as the records of the merchandise he had and the value thereof on the date of loss.

The Court: Is there any further objection?

Mr. Roemer: No. further objection, Your Honor.

The Court: They may be received.

102 (Said document, so offered and received in evidence, was marked Plaintiff's Exhibit No. 5.)

Mr. Magid: I offer in evidence at this time . . . Plaintiff's Exhibit No. 1 for identification, which the plaintiff has testified is his permanent record which he has kept as long as he has been in business which contains all the records of all the items purchased by him, the cost of

103 the items, and all the items which are sold by him and as a permanent inventory and perpetual inventory of his business.

The Court: Any objection?

Mr. Roemer: Only the same objection I made before . . . that I do not think these records are properly kept or entitled to be admiitted, nor do they show what items were in this particular bag.

* * *

104 The Court: Let's identify the items you think were in this case.

Mr. Magid: I will get to that Your Honor, right now.

105 Witness (confirming): I made a determination of what property of my own I had in my bag on September 11, 1955.

Q. Will you tell the court how you made that determination.

A. After I learned of the loss I went to my books, the inventory. First of all I checked my memos to find out which was outstanding, which items were outstanding. Then I went to my inventory and compared it with the stock books to see which was checked off and which wasn't, and there weren't many numbers so I could have told without the records which were missing, so I copied them right from the stock book.

I took a physical inventory of all the merchandise.

* * *

106 I went to my inventory sheets, compared them with the stock book and my memorandum.

The Court: What memorandums?

Witness: I have what they call—right on here—the watches that the customers had at the time, and then what was checked off and what was missing. There were only thirty watches. It was very easy to determine.

107 The Court: He refers to three other papers.

Mr. Magid: I am getting to that. I have another paper here, Your Honor.

Q. Did you make a written record, Mr. Mintz, of the items of your own property which you state were in your bag on September 11, 1955.

A. I did. I do not have the original of that record with me. The original went to the insurance company and a copy went to the police.

Q. I show you plaintiff's Exhibit No. 9, which I will have marked for identification.

(Said document was marked plaintiff's Exhibit No. 9 for identification)

And I ask you if you have ever seen that document before.

A. Yes. I prepared it on September 13, right after I discovered there was a loss.

108 It was done in my office. I obtained the information that is contained in that record by checking my inventory and my stock book. I know what property of my own was in the sample case on September 11, 1955, of my own knowledge, without the use of any other document. There were thirty watches, of which 3 were without diamonds, and there were 15 rings of various types; one with a little genuine ruby and two Linde star sapphires and some personal rings.

109 I cannot describe these rings in detail as to number of stones or weights without referring to the records. I have permanent records to show the weight and size of the stones and the type of my property which was in the bag at that time.

Q. I show you plaintiff's exhibit No. 9 for identification, and ask you where the information contained in this sheet was taken from?

A. This was taken from my stock book and the inventory and the memorandums.

110 The Court: The stock book and the inventory and the what?

A. The stock book and the inventory. The memorandums are in the inventory—the stock book and the inventory. These were made on September 13, 1955. By the process of consulting my records I prepared the statement of the loss of the items of my own property contained in my bag on September 11, 1955.

Mr. Magid: I offer plaintiff's Exhibit No. 9, in evidence.

The Court: It is not admissible. It is just some-
111 thing he made up afterwards.

By Mr. Magid: If the Court please, he makes it the first time he knows his loss.

By the Court: It is made up afterwards. He made it up from consulting this permanent inventory, as he

calls it, two or three items in this pile of papers here and looking at them he makes this up afterwards.

By Mr. Magid: He testified, your Honor, that he took a physical inventory of the property he had left. He knows what he had on hand from his other inventory.

By the Court: He is going at it another way. Now you are taking a physical inventory.

By Mr. Magid: I said he testified he took a physical inventory of the items he had left after September the 11th, 1955.

By the Court: Well, we will recess at this time 112 until ten o'clock tomorrow morning.

By Mr. Magid: Is there any objection to admitting these stubs in evidence?

By Mr. Roemer: No objection.

By the Court: They may be received.

By Mr. Magid: Plaintiff's Exhibits 6, 7 and 8.

(The stubs referred to were thereupon received in evidence as Plaintiff's Exhibits Nos. 6, 7 and 8.)

(Whereupon the trial of the above-entitled cause was adjourned to 10:00 o'clock a.m. of Thursday, June 6th, 1957.)

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113 Court reconvened on June 6, 1957 at 10:00 o'clock A.M.

Present:

Cecil E. Magid, on behalf of plaintiff.

Erwin W. Roemer, on behalf of defendant.

The following proceedings were had:

114-118 * * *

119 (Inventory record of September 15, 1957 marked plaintiff's Exhibit 10, for identification.)

Direct Examination of Harry L. Mintz (Resumed).

120 Plaintiff's Exhibit 10 for identification is the inventory of merchandise on hand in my office on September 15, 1957. It is in my wife's handwriting but I dictated it. In preparing this I took inventory of what I had in my safe.

121 This is a part of my regular records and it determined what I had on hand as of September 15. The making of this inventory was occasioned by the loss.

122 I determined the description and the value of the items which I had in my bag on September 11, 1955

123 by taking the Sept. 15 inventory and compared it with my inventory of June 25, taking into consideration the items sold, and then I referred to my stock book for the values. At that time I made a written computation of the description and value of the items lost. The document you show me marked plaintiff's Exhibit 9 is a true and correct copy of the computation I made by the comparison of the two inventories I referred to pre-

124 viously. This document was typed by my wife pursuant to my direction and supervision.

* * *

125-139 * * *

140 Mr. Magid: I have offered plaintiff's Exhibit No. 2 in evidence yesterday. There was an objection by Mr. Roemer . . . This was the inventory of June 25th, which the witness testified be kept current until September 11, and that he had this property on hand on September 11, 1955. The court did not rule on plaintiff's Group Exhibit No. 2. I offer that in evidence at this point a showing what he had on hand on September 11, 1955.

The Court: Is there any objection to that?

Mr. Roemer: No, your Honor, I won't object.

The Court: It may be received. (The document prev-

ously marked plaintiff's Exhibit No. 2 was received in evidence)

Mr. Magid: I would like to offer at this time plaintiff's Group Exhibit No. 10, which constitutes the in-
141 ventory taken on September 15, 1955, on which there has already been testimony and I ask that it be received in evidence.

The Court: Is there any objection to that?

Mr. Roemer: I am not objecting to the exhibit.

The Court: It may be received.

(This document previously marked plaintiff's Exhibit No. 10 was received in evidence.)

142-143

144 Mr. Magid: If the court please, I will offer plaintiff's Exhibit No. 9.

145 The Court: Is there any objection?

Mr. Roemer: No objection.

The Court: It may be received. (This document previously marked plaintiff's Exhibit No. 9 was received in evidence.)

Witness (Continuing): On September 11, 1955 I had in my possession the items shown in plaintiff's Exhibit No. 9.

146 On September 11, I took 30 watches and placed them in two trays, and a tray of 15 rings and packed them in my sample case with the other merchandise. That is the sample case which I delivered to the red cap at the Union Station. On September 15, I made a computation of the value or cost to me of the items shown in Exhibit No. 9. The amount is $6,591 and some odd pennies. That is the amount which I claimed from the insurance company.

147 All these amounts are shown in Exhibit No. 9.

148

149 Mr. Magid: I now offer plaintiff's exhibit No. 1, in evidence.

Mr. Roemer: I don't object to the book . . .

The Court: The book may be received.

(The document previously marked plaintiff's exhibit No. 1, was received in evidence.)

Witness (Continuing): I made a computation of the figures Exhibit No. 5 showing in the columns on the
150 Samuel Abramson inventory of 1955. By adding these figures I could arrive at the amounts.

Mr. Roemer: Do you have a tape on that?

Mr. Magid: I happen to have a tape on that, that I made. If you have no objection I will give you the total.

Mr. Roemer: . . . I have no objection.

Mr. Magid: The total of the computation made of
151 the figures shown on the Abrahamson inventory contained in plaintiff's Exhibit No. 5 in evidence is $21,119.65.

Mr. Magid: Q. Will you turn to the Ostrow and Samit inventory . . . Mr. Roemer, I have a tape showing the totals of the amounts shown there.

Mr. Roemer: The Ostrow and Samit inventory. That total is $16,248.50. The items referred to in that portion of Exhibit 5, marked Samuel Abramson sample line
152 I obtained in 1955 on which I was getting orders.
153 They refer to the style number and the sales price. Each one of the entries refers to a particular ring. This property was in my office vault on September 11, 1955, and on that date I took the tray containing these rings and put them in my sample case.
154 The entries shown on that part of plaintiff's Exhibit No. 5 headed Ostrow and Samit Line, January 1955, refer to the style numbers and the sales price of the rings I had in my possession as part of the sample line of Ostrow & Samit, on September 11. I checked these also and

put the trays in my sample case which I took to the station and checked with the Red Cap. The fourth and sixth column on the first page of the Ostrow and Samit line refer to the sales prices at which I took orders.
155 That is the amount I was supposed to get for the ring when delivering the ring or taking orders. I sold some of the items that are entered on the portion of Exhibit 5 marked Ostrow and Samit line. The items I sold are circled. I sold them for the prices indicated opposite those numbers. I sold these items between January and the date of the loss on September 11. The same is true of the items entered on the back of the page marked Ostrow & Samit Sample Line. The entries in the fourth and sixth columns on the sheet marked Samuel Agramson
156 Sample Line also refer to the sales price. I did not sell any of the items out of the sample line. I took orders for the items shown by the Samuel Abramson line prior to September 11, 1955. The orders were taken at the prices stated in the inventory, with the exception of prices that were changed, as are indicated on these sheets of the Samuel Abramson Sample Line of 1955.
157-158 * * *

159 *Cross Examination by Mr. Roemer.*

Mr. Mintz: Mine is a self proprietorship. No one else is in business with me. I have no employees. I have part of an office in the Hayworth Building. It is like a suite with other tenants and each has an office.
160 At that time there were three others. I got there in 1953 or 1952. We did not share any stenographic service, or clerk or anything. The only one who was there at the time was the diamond setter. I had nobody in
161 the office representing me while I was not there. Whoever was there would answer calls. There was one telephone for the four of us. None of the other three had

any employees. None of us had bookkeepers. My office was about nine by five. Schriever's office was about
162 the same. The diamond setters was about four by four, very small, and Frank Newberger just had a desk out in front. We had a single vault in my place and four feet long and about three and a half feet wide. There was no relationship between me and the other tenants except that we were mutual tenants. The diamond setter never did any work for me and I never did any work for the others. I started this line of work that I was doing on September 11, 1955 in 1946.

163 My work consisted mainly of traveling. My territory was Pittsburgh, as the easternmost part, the southern part was New Orleans and the western part was Kansas City or Dallas, whichever is farthest west; to the north it was Minneapolis. I did not go up to the Canadian border; the territory was high spotted. In certain states it was only one city—large cities mainly. During a year I would be in the office about two weeks of every
164 month, during which I would sell around the city.

165 I can be regarded as a seasoned traveller. I did nothing different on September 11, 1955 from what I did in connection with any of my trips and hiring a red cap to carry my bags. I followed customary procedure. I had my personal bag in addition to my sample cases. I count the sample cases as two bags. This was a usual load. I have been accustomed to hiring a red cap at whatever railroad station I went to.

166 The usual charge is 25¢ a bag, and usually gave a 25¢ tip. In hiring a red cap at the Chicago Union Station it was customary for the red cap to have a truck on which to place the bags, but not always. These trucks were usually well loaded with bags. That was the
167 reason I told the red cap to be careful with my bags so they wouldn't fall off, because my bag had wheels,

and it could roll off.

168 * * *

169 I took my personal bag to the office the day before,
170 on Saturday. My salesman's bag was in the office.
The last time I took it to the office was probably on Friday before that, I was out Thursday or Friday. I had these items of jewelry in my bag at that time with the exception of my own merchandise which I didn't take out in Chicago. I don't take my merchandise with me
171 when I work in the city. I had my Samuel Abramson, Ostrow & Samit, K & S and S & D lines with me in the city. These things would be constantly in and out from the shelf. I put them in when I would go out in the morning. I constantly work with them. I last put them in the bag before September 11, on September 9. I took them out on September 10th. They were in the
172 vault. When I cleaned up the rings I put all the merchandise on the shelves on Saturday, September 10th. None of these items of jewelry were in the bag at that time. There is a Sesame lock on each compartment of my bag. I sometimes keep the jewelry in the bag when I am in my office because I have to run out w. h it. I took
173 everything out of the bag on September 10. I took the 20 trays of the Samuel Abramson line out and cleaned them as was my custom before leaving for a trip.

174 Ostrow & Samit line didn't need any cleaning. I put them right back after I checked them. I took everything out of the bag on that day and put it all in the vault, including the empty bag. I made no written memorandum on September 10, of the items I took out of the bag. When I replaced the items I compared it with
175 the sheets, because they were run the way the rings were placed and I used to put it in that order. That is

what took 15 or 20 minutes. I did that with Ostrow & Samit line particularly. I made no memorandum of the watches I put in there. I had other jewelry in my office after I had checked my bag on that day. There were watch attachments and loose diamonds. There were no
176 rings but there were five watches left. I think there was one pair of earrings and some diamond hearts, some Hamilton movements, without diamonds. These were left in my vault when I went away. Prior to June 1955 I took an inventory in January, 1955.

177 In arriving at the figures shown and Plaintiff's Exhibit No. 9 I took my inventory of June, 1955, and made a new inventory of September 15, 1955, deducted the items on my books as having been sold, and then made a list of the missing items. Then I went to the stock book and that informed me of the exact cost of each component part of the watch and I got the total which you have on that sheet. The prices I listed are sales prices for the other items, but not mine, mine were listed at cost. The Abramson and Ostrow and Samit lines were all sales
178 prices fixed by the manufacturer. I had the K & S line with earrings. There are no earrings listed in Plaintiff's Exhibit No. 9. I did not have any earrings
179 of my own in the bag. I had one pair of earrings in the vault. I did not prepare any list similar to Plaintiff's Exhibit No. 9 as to the other lines. The only listing I made was as to my own property.

180 * * *

181 In my experience I have found that red caps accept bags for various trains. Some might be for my car and some for other cars. The red cap put these bags
182 on the train. On September 13, I went to the office of the Station Master at the Chicago Union Station and met Mr. Carlson the Station Master. I also met some other individuals there. I can't recall any Mr. E. A. An-

derson representing the Pinkerton Agency in behalf
183 of the Jewelers Assoc. I think the head of the police department at the Union Station was there. I don't remember his name. Mr. Goulding sounds right. There was a stenographer there who took notes. They took reports of me and of Mr. Rettig who came in later. Two detectives came in, I think Mr. Goulding called them
184 from Racine Avenue Station. Whatever took place there was taken down by a male stenographer. I don't recall if I was given a copy of that transcript. I have seen it in the possession of the insurance company lawyer. I have read it. The conference took place about 9:30
185 in the morning. I was alone. It took place in the Union Station Building. I told them at that time that I was a manufacturers' representative with an address at 29 E. Madison Street, Room 1515, Chicago. I told them I represented S & D Jewelry Manufacturing
186 Company. I gave them that address, and Samuel Abramson, Ostrow & Samit and K & S Jewelry Co. I told them I carried merchandise for myself as well.

Q. At that time when you were asked to tell about this occurrence, did you make this statement? I will chop it off in sentences so you can follow it a little easier.

"I had brought my suitcase from home to my office on Saturday"?

A. Right.

Q. "I arrived at my office on Sunday about 3:45 P.M. Daylight Savings Time."?

187 A. Right.

Q. "Was there about fifteen minutes. Then waited for a cab for about fifteen minutes."?

A. Yes.

Q. "I arrived at the station where bags were unloaded. There were no redcaps, so I brought the bags into the station alongside of the baggage where the trucks are and got this redcap"?

A. Yes.

Q. "He was checking this baggage for Parlor Car 231."?

A. Correct.

Q. Was that a Parlor Car in which you held a seat?

A. I had a coach seat.

Q. "The red cap took the three bags I had, and I told him to be careful in loading them so they wouldn't roll off of his truck."?

A. I said that, and I also said something else.

By Mr. Roemer: The latter part, I move to strike that out, if your Honor please.

By the Court: Strike it out.

188 By Mr. Roemer:

A. "This must have been around 4:20 or 4:25 p.m."?

A. True.

Q. "Then he put the checks on my bags and gave me the tickets for them, presenting redcap 71 checks 792319, 792320 and 792321. Then I made a telephone call to the house, and usually in order to avoid the crowd I walk through and wait outside for the train and wait outside in the train shed concourse for the train."?

A. That is right.

Q. "This was even before the train came in, and I went out on the platform where there were several other people."?

A. Yes.

Q. "Then I noticed a redcap. I don't know whether it was my redcap or not. It looked like mine, and looked for my bags on his truck, but didn't see them, so I said to him, 'Are you 71,' and he didn't answer me. Maybe he didn't hear me as he was busy checking numbers on
189 the cars. I don't know if it was 71 or not. Then the train came in, and I got on the train before the ..."?

A. Well, there is a little—

Q. Did you make that statement?

A. —discrepancy there.

Q. What is that?

A. There is a little difference. He couldn't have checked the numbers on the cars. The train wasn't in. He probably misconstrued it.

Q. All I am allowed to ask you is, did you say this?

A. No, I didn't say exactly that.

Q. Did you say that in substance?

A. In substance, yes.

Q. You did later see him checking in the cars, didn't you?

A. No; I got on the train then. The train just came in.

Q. When you got on the train, the train was there and the redcap was there, wasn't he?

A. I didn't see any redcap.

Q. This statement, this transcribed statement that
190 I just read to you, that part of it, and all the rest of what you told them at that time, that transcript has been in the possession of you or the insurance company ever since that time, hasn't it?

A. I don't know. It may have. It wasn't in my possession.

Q. What is that?

A. It wasn't in my possession. I don't know if they had it.

Q. They gave a copy to anybody who wanted a copy there that day, didn't they, as soon as it was transcribed?

A. I don't recall. You mean the Station Master did?

Q. Yes.

A. Well, I never got a copy.

Q. You don't recall it?

A. No.

Q. Mr. Rettig was brought in, in your presence, wasn't

A. That is right.

Q. And they interviewed Mr. Rettig in your presence, didn't they?

A. Correct.

191 Q. And the stenographer took down what Mr. Rettig said as well as what you said, isn't that right?

A. That is true.

Q. And in that portion of the statement which is in the possession of your attorney which you have seen, that included a transcript of what Mr. Rettig said as well as what you said, didn't it?

A. That is true.

Q. And you have had an opportunity to read that?

A. I did.

By The Court: What is the answer?

By The Witness: I did.

By Mr. Roemer:

A. Did Mr. Rettig that day say in your presence; "Thi gentleman" indicating Mr. Mintz, "asked me to handle his bags, and I asked him to wait as I was busy."?

A. Yes, he did say that.

Q. "I put the checks on the eight bags and then came back to Mr. Mintz to take care of him."?

A. He did say that.

192 Q. "I got three bags from Mr. Mintz, two sample cases, one with wheels, and a brown two-suiter bag. After getting the bags from Mr. Mintz, I left them on the floor as I had the eight pieces. As I loaded the bags on my truck in a certain way to speed delivery on the train, I leave them all on the floor until I have all my loads and then proceed to place them on my truck in this certain manner."?

A. He did.

Q. Did he say that in your presence?

A. Yes, he said that.

I have not taken any exception to what was in the transcription from the time I first saw it to this date. When I was in Mr. Carlson's office it was only two days after the loss.

193 I didn't make a memorandum shortly after the happening of this loss on September 11, 1955, because I didn't know they were lost. The only written memorandum I worked on was the inventory. I think also submitted a written memorandum to the insurance company.

194 I have not seen such a statement since then.

195 I stated on direct examination that when I gave the bags to redcap Rettig, No. 71, I said, "Be careful they are valuable. Be sure they don't fall off the truck."

Q. That statement which you testified to here contains the additional "Be careful, they are valuable." When did you first come to the conclusion that you had said, "They are valuable."?

196 A. Well, I always make that statement to the redcaps.

Mr. Roemer: I move to strike that out.

The Court: Strike it out.

Q. Mr. Roemer: When did you first come to the conclusion that you had made that statement to the redcap?

A. I imagine I told that to the insurance company or made statements to the various investigators. There was no time to—

By Mr. Roemer: Will you produce the statement he made to the insurance company, please?

By Mr. Magid: I have in my file, Mr. Roemer, a copy of the statement that was purportedly made by Mr. Mintz.

By Mr. Roemer: Don't you have the original?

By Mr. Magid: I don't have the original. I never

knew there was an original in existence. This came in the file from the Adjuster, a copy of a statement purportedly made by Mr. Mintz. I have no objection to your using it.

197 By Mr. Roemer: Q. I will show you a document consisting of four pages which I would like to have the Reporter mark as Defendant's Exhibit No. 1, for identification.

(Said document was thereupon marked Defendant's Exhibit No. 1 for identification.)

By Mr. Roemer: A. (Continuing) Since this statement is typewritten, I take it it is not the one you had in mind when you said you think you wrote one in longhand?

A. As I say, I am not sure whether I wrote it.

Q. Will you look through that statement and see if you recall signing any such statement?

A. Yes; I think I did sign the statement.

Q. You think that this is the statement that you might have had in mind when you said you did make a report to the insurance company?

A. Yes. I had to make a report.

Q. Will you look at this and see whether there is any statement in that report of anything that you claim you said to the redcap 71, Mr. Rettig?

198 By Mr. Magid: I think the document speaks for itself, your Honor.

By The Court: He is cross examining.

By The Witness:

A. I just gave him the general thing of what happened.

By Mr. Roemer:

Q. That wasn't my question. Do you find anything in there that could have possibly refreshed your recollection on what you said to the redcap?

A. There is nothing here what I said to the redcap.

Q. So that statement couldn't have refreshed your recollection about anything you said to the redcap, could it?

A. No, not that statement.

Q. I also notice underscored in this statement the following:

"I lost most of my records which was in my personal bag."

Did you make that statement to the insurance company?

A. Yes; I must have made that statement.

Q. Did you underscore that?

199 A. No.

By Mr. Magid: I did that, Mr. Roemer.

By Mr. Roemer: All right. Thank you for the contribution.

By Mr. Roemer:

Q. Did you mean that when you said it; "I lost most of my records which was in my personal bag."?

A. Yes, I did. I testified to that. By personal records, I mean those memos that the companies sent to me when they turned over the merchandise to me. I kept that as a check.

Q. Was that the subject matter of some conversation between you and your attorney?

A. No.

Q. That underscored part that I just read to you?

A. That is the first time that I saw that. I never saw that paper.

Q. Well now, that you have looked at this report you say it does not refresh your recollection as to anything you said to the redcap, and will you tell us of any written memorandum that you may have made at any time subsequent to September 11, 1955 in which you

200 mentioned what you claim you said to the redcap?

A. I have no such memorandum.

Q. So that you are relying entirely on your recollection?

A. That is right.

Q. Would you be able to inform us as to when this statement was made by you?

A. I think it was made that Tuesday or Wednesday, the next day.

Q. Within three days?

A. Within three days or so.

Q. Do you recall making any other statement to your insurance carrier?

A. No, not offhand.

Q. Well, think about it for a moment.

A. No, I don't.

Q. It is your present recollection that this is the only statement that you ever made to your insurance carrier?

A. As a statement, yes.

Q. Well, you mean by "As a statement," that which was in writing?

A. No, I don't mean that. I don't know whether
201 I made a writing of that. What I mean is that that was the statement of what happened. In those subsequent conversations about the inventory

Q. Not conversations. I mean in writing now from which you could have refreshed your recollection.

A. Not other than the inventory. That is the only other writing I submitted.

Q. In your inventory, you didn't relate anything about any conversation with Mr. Rettig, did you?

A. No, sir.

Q. At the time you signed this statement, did you

tell your insurance carrier that your total inventory June 27 was at cost $21,844.92?

A. I believe I did. He had a copy of it.

Q. Did you tell him, "My inventory at the time of loss was about the same"?

A. I may have, yes.

Q. Well,—

A. I am not sure.

Q. So as to make certain of it, will you look at it and tell us whether you did say that?

By Mr. Magid: If the Court please, I believe counsel here is taking things out of context out of that state-
202 ment, and I think the statement should be read in total if it is to be used at all.

By the Witness: Yes; there is an explanation for it.

By Mr. Roemer: The latter part I move to strike.

By the Court: Strike it out.

By Mr. Roemer:

Q. You say you made that statement or you didn't?

A. I may have made it, yes.

Q. After looking at that statement, can you tell us whether or not you did make it or didn't?

A. I don't remember. It is after my name, too, here.

Q. Produced from the files of the insurance carrier. Does that jog your memory that you did make that statement?

A. No, it doesn't.

203 Q. You weren't trying to mislead your insurance carrier when you made it, were you?

A. No, sir.

Q. You were giving your honest appraisal at that time?

A. If I made that statement, yes.

Q. Are you still in doubt as to whether you made it or not?

A. I don't remember it.

Q. Did you read the part immediately above your signature?

A. Yes.

Q. In that you say, don't you, "The above is a true and correct statement to the best of my ability. I have read all four pages of the statement, signed all pages and initialled all errors. Harry L. Mintz." Do you remember that?

A. I have a recollection of that.

Q. Apparently, the statement immediately under your signature, "My total inventory June 27th was at cost $21,844.92. My inventory at the time of loss was about the same." Appears to have been written, transcribed at the same time as the rest of the statement, doesn't it?

A. I wouldn't know.

204 Q. I say it appears to be. Of course you wouldn't know, but it appears to be, doesn't it?

A. Well, you could construe it that way, yes.

By Mr. Roemer: You say you don't have the original of this?

By Mr. Magid: I don't. I have not seen the original. That came with correspondence from the insurance company.

By Mr. Roemer: Do you have any other statement?

By Mr. Magid: No, other than the statement given to me by the Adjuster which is the statement taken at the Union Station which you have.

By Mr. Roemer:

Q. As I understood your testimony, you made two approaches to the redcap, didn't you?

A. At the time of checking?

Q. Yes.

A. Well, I wouldn't say it was two approaches. I

didn't move away and approach him again. I remained there.

205 Q. Well, let's put it this way again: You talked to him twice?

A. I talked to him twice, yes.

Q. And the first time you talked to him, he told you he was busy, that he was loading eight bags on the truck, didn't he?

A. That is right. He didn't specify at that time to me that it was eight bags, but I could see he was busy.

Q. When was it you had this claimed conversation with the redcap?

A. What do you mean "claimed conversation"?

Q. The one you claim where you talked to him about the bags and, "Be careful. Put them on the truck so they don't roll off"?

A. That was while he was putting the stubs on my bags. At that time I told him.

Q. And you told us this morning why you told him to be careful about not having them roll off the truck?

A. That is right, on account of the wheels.

Q. You had no other conversation with any redcap except the one that I read to you here, did you? You didn't talk to any other redcap?

A. No.

206 I wasn't sure I talked to the same redcap a third time. I did not see my bags on the redcap's truck. My bags were distinctive.

I would have recognized them without any trouble with the exception of the two-suiter, which was ordinary. My sample bags had wheels underneath.

Q. And that was the reason that you wanted him to be careful so that it wouldn't roll off the truck.

A. Yes. Usually I tell them how to load it.

Mr. Roemer: I want to strike that out . . .

The Court: Strike it out.

207 At the time my bags were alongside this truck there was no one milling around my bags. I saw one fellow talking to another redcap.

Q. At the time that you talked to Mr. Carlson, the Station Master, when he asked you, "Did you see anyone milling around your bags," did you say, "There was a big fellow there talking to the redcap"?

A. To a redcap. I just said that.

Q. That is the redcap?

A. A redcap, not my redcap.

Q. This says "the redcap."

A. I can't help that.

Q. That is specific, isn't it? That isn't the one you meant?

A. It was a redcap.

Q. So where was that redcap?

A. About four feet away, I should say.

Q. Four feet away from what?

A. From the truck.

Q. Was Rettig, redcap No. 71, there at that time?

208 A. Yes.

Q. When you were asked the question by Mr. Carlson, "Did you see anyone milling around your bags," did you say, "There was a big fellow there talking to the redcap"?

A. That is wrong.

Q. Did you say that?

A. I don't believe so. It couldn't have been. I did not say that.

Q. Have you seen it in your statement?

A. Well, I have not seen the statement since. I see it now, but there are a lot of other errors in there, too.

By Mr. Roemer: I move to strike the latter part out, if your Honor please.

By the Court: Strike it out.

By Mr. Roemer:

When did you see this statement first, the one you gave, the transcript of which was furnished to the insurance carrier, taken at the Union Station in Mr. Carlson's office?

A. I don't remember if they transcribed it in my presence and made me read it or not. I don't recall.

209 If I did, the next time I saw it was at Mr. Magid's office.

Q. When was that, when you started suit?

A. About a week ago or two weeks ago.

Q. Had you been to Mr. Magid's office before that time?

A. No; I had not been to his office—

Q. You claim you have never been to Mr. Magid's office until a week ago?

A. A week or two ago.

Q. That is the first time you ever were there?

A. That is correct.

Q. At that time were you shown this statement?

A. I believe it was at that time, one of the conferences.

Q. And you read it through, did you?

A. Yes.

Q. Will you look through this statement, which I have had marked as Defendant's Exhibit No. 1?

By Mr. Magid: You had the other one marked Defendant's Exhibit 1.

By Mr. Roemer: Then we will have this one marked Defendant's Exhibit No. 2.

210 (Said document was thereupon marked Defendant's Exhibit No. 2 for identification.)

By Mr. Roemer:

Q. Tell us where, if at all, you see any errors in that statement.

A. There is a typographical error here.

Q. All right. That typographical error, instead of "went out" it reads "wet out," and a letter "n" was left out of there?

A. Yes.

Q. All right. Is there anything else you can find wrong with that statement?

A. Well, I still take exception to that "the".

Q. To what?

A. To "the," when I said "a".

Q. All right. Is that the only exception?

A. I didn't finish it.

Q. I didn't mean to take it out of your hands. I meant only your part of it. Mr. Rettig's statement is there, too, isn't it?

A. I didn't come to that yet.

Q. Take your time.

A. He has car "23" and it should have been "231".

211 Q. All right. Is there anything else you take exception to?

A. Well, I am not going over Rettig's since I don't know what happened.

Q. You were there when he said it?

A. Yes.

Q. Do you find any fault with that part, which was transcribed or said in your presence by Mr. Rettig?

By Mr. Magid: I didn't hear that last statement.

By Mr. Roemer: Q. I say, do you find any fault with that part of it, with Mr. Rettig's statement, that was transcribed?

By Mr. Magid: You said "transcribed in his presence".

By Mr. Roemer: What I meant was, "said in your presence".

By the Witness:

A. The car again.

By Mr. Roemer:

Q. The same mistake in the car number?

A. That is right. That is it. The one I read had 212 many more errors, the one that was at the office.

Q. You say the one you read in the office was different than this?

A. I think it was.

By Mr. Roemer: Will you produce that one, please?

By the Witness: I am pretty sure that were more errors.

By Mr. Roemer: Will you concede that it is the same, that the two are the same?

By Mr. Magid: If you tell me the one that is in the deposition is a photostatic copy of this, I will say it is the same.

By Mr. Roemer:

Q. Will you accept your lawyer's statement on that?

A. Yes, I will accept it.

Q. That the photostatic copy that you saw is the same?

By Mr. Magid: That is if you tell me the other is 213 is the photostatic copy of that.

By Mr. Roemer: I am sure of it.

By Mr. Roemer:

Q. You have looked through that statement. Is there any exception that you take in the statement you made to your insurance company?

A. No. As I say, I don't recall that last statement.

Q. You don't recall that last statement?

A. Making that.

Q. You wouldn't say you didn't make it, would you?

A. No, I wouldn't.

Q. You have indicated you remember the car number that you were assigned to?

A. I wasn't assigned to any car number.

Q. What is this car 231 you are talking about?

A. That was the baggage that Rettig was checking in for these two men, these eight pieces of luggage. I was there and heard him say car 231.

Q. He was checking them in car 231?

A. Yes.

Q. That didn't concern you at all except you had to wait until he got through?

214 A. That is right.

Q. This was a Burlington train, wasn't it?

A. It was.

Q. And the Chicago Union Station is where the Burlington trains enter and leave?

A. That is true.

Q. And there are three other railroads that enter and leave that station?

A. Yes.

Q. One is the Chicago, Milwaukee & Pacific?

A. Yes.

Q. And the other is the Gulf, Mobile & the —

A. The Pennsylvania.

Q. What is the other?

A. And the Pennsylvania.

Q. And you were familiar with that at that time?

A. Yes.

Q. And you knew that all four of those railroads used that station?

A. Yes, I did.

By Mr. Roemer: That is all, your Honor.

Redirect Examination by Mr. Magid.

215 With respect to defendant's Exhibit No. 1, where it is stated "My total inventory June 27th was at cost $21,844.92. My inventory at the time of loss was about the same, if I made that statement I was referring to September 11.

With regard to defendant's Exhibit No. 2—I was present when Mr. Rettig made his statement. I recall his having said the things that are contained in this statement.

Q. When I read Mr. Rettig's statement—portion by portion, will you tell me whether you recall his having said these things that are contained in this statement?

A. Yes.

Q. "On Sunday we only had nine redcaps, and the train in question, C. B. & Q. 23, is usually loaded
216 by redcap Heenan." Did you hear him say that?

A. Yes.

Q. As I read these, I won't repeat that same question:

"I was assigned to Milwaukee No. 6 and had come back from that train and delivered baggage therefrom. Chief Usher L. V. Barton then asked me to load C. B. & Q. train No. 23, as Heenan was not there and, as I had loaded this train before, I arranged to do as requested. I took my truck over to the entrance-way to the north side cab court and parked my truck there and proceeded to load baggage. At that time people were there waiting. I had parked my truck in the doorway of the north side cab court opposite end of the lockers. One man was standing there with eight pieces for Car P-23.

"This gentleman, indicating Mr. Mintz, asked me to handle his bags, and I asked him to wait as I was busy"; so that is everything he said as you recall it?"

A. That is right.

217 Q. "I put the checks on the eight bags and then came back to Mr. Mintz to take care of him. I got three bags from Mr. Mintz,—two sample cases, one with wheels and a brown two-suiter bag. After getting the bags from Mr. Mintz, I left them on the

floor as I had the eight pieces; as I load the bags on my truck in a certain way to speed delivery on train, I leave them all on the floor until I have all my loads, then proceed to place them on my truck in this certain manner."

Did you hear him say that?

A. Yes, generally.

Q. Did he say the following?

"Redcap P. Maguire called to me there was another party going on the four o'clock Zephyr, and I said I didn't think I could handle them.

"Then I believe there was another lady for car going to St. Paul. Then I ran out in the cab court and picked up a seven-piece load going to LaCrosse, the fellow telling me he was moving, and I pulled my
218 truck out in the cab court, during which time Mr. Mr. Mintz's bags were still on the floor in the station, and then there were some more people going to St. Paul."

Did you hear him say all of that?

A. Yes, in general.

Q. Did you hear him say this?

"Then a young gentleman came up and said, in effect, they weren't going to St. Paul, he guessed they were going to drive up. By this time Mr. Mintz's baggage had been loaded on my truck by myself. They were winged on the bottom with car P-23 eight-piece load on the top. The man said to me he wasn't going to make the train and said he wanted the bags. I asked him if he had the checks and he said his brother had them and was making a telephone call.

"I told him I would be there ten minutes and asked him if he would come back. I proceeded to load my bags on my truck for train 23, and in about three

or four minutes this young gentleman came back
219 and said, 'We're all ready' and wanted these three bags, pointing them out. I remember remarking to some man about having to tear my load apart. I took the bags off for car P-23 from the rear of my truck and pulled these three bags out.

"Then the man said 'Will you take me to a cab' and I think I remarked I didn't have time, or something like that, then said I would take him out to the north side there. There was a Yellow cab pulling in the line. So I picked up the three bags and carried them out to the cab court and asked the cab driver if he wanted to pick up a load there and he said 'Yes' so I put the black sample case with the wheels in the loading part of the cab next to the driver.

"The other two bags were still on the sidewalk, and I helped the man with the other bags, he saying he could put them into the rear with him. I did not get the cab number. After putting the three bags in, he stayed there with —the word here is spelled g-a-e-k. I suppose it means back, b-a-e-k. Would you agree it
220 is 'back door'?"

By Mr. Roemer: Yes.

By Mr. Magid:

Q. (Continuing): "—back door open, and I hesitated there, waiting for another party. Then I started walking back into the station, and as I turned around I saw the cab pull away as I was just at the door entering the station.

"The bags were put in the cab between 3:25 p.m. and 3:40 p.m., Central Standard Time.

"There were two black sample cases made of fibreboard, one of which had wheels; the bottom section with wheels had straps, the top section had a hard handle. The other item was a brown two-suiter bag."

Did you hear Mr. Rettig at the time of the statement made in the Station Master's Office on September the 13th, say the things I have read from this statement?

A. Yes.

Q. Mr. Mintz, in connection with this statement
221 made on September the 14th, did you say anything more to Mr. Rettig at the time you delivered these sample cases and your bag to him other than appears in this statement?

A. Yes.

Q. Will you state what this was?

A. Well, I told him the same thing I tell everybody.

By Mr. Roemer: Your, Honor, I object to that, and I move to strike it out.

By the Court: Strike it out.

By Mr. Magid:

Q. Just answer my question.

A. I told him to be careful of the bags, not to have them fall off, and the value.

Q. Did you ever sign the statement which both Mr. Roemer and myself read to you?

A. I don't recall.

222-225 * * *

226 Referring to defendant's Exhibit No. 1, where it is stated, "I lost most of my records which was in my
227 personal bag." By that I meant the duplicate memos which the firms sent to me showing this merchandise and from which I took the inventory of the various lines.

(Witness excused.

Mr. Magid: Plaintiff rests.

(Thereupon the plaintiff rested its case in chief.)

228 (And thereupon the defendant to maintain the issues in its behalf introduced the following evidence.)

WALTER F. CARLSON, called as a witness on behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Roemer.

My name is Walter F. Carlson, I live at 5453 Pensacola Avenue, Chicago; I am, and have been Station Master at Chicago Union Station Company for thirteen years.

229 The Chicago Union Station Company acts as agent for the operation of trains, which include handling 230 baggage for passengers by our red caps. That includes furnishing red cap service for the convenience of the carriers that enter and leave the Union Station. In September 1955 Rettig was one of the red caps in its employ. On or about September 12th or 13th I was informed of a loss of baggage by Mr. Mintz. On September 13, Mintz came to my office and informed me of his loss. There 231 were other persons present: Mr. Clark the stenographer, later Mr. Goulding, the chief of police and two detectives from the Chicago police force; and E. A. Anderson of Pinkerton National Detective Agency. At that time I asked Mintz to tell me the details about this 232 transaction and loss. At this time he told me:

"I had brought my suitcase from home to my office on Saturday. I arrived at my office on Sunday about 3:45 p.m., Daylight Saving Time, was there about fifteen minutes, then waited for a cab for about fifteen minutes. I arrived at the station where bags were unloaded; there were no redcaps so I brought the bags into the station alongside the baggage where the tracks are and got this redcap. He was checking in baggage for Parlor Car 231. The redcap took the three bags I had and I told him to be careful in loading them so they wouldn't roll off

his truck. This must have been around 4:20 or 4:25 p.m. Then he put the checks on my bags and gave me the tickets for them, presenting redcap 71 checks 792319, 792320 and 792321. Then I made a telephone call to the house and usually, in order to avoid the crowd, I walk through and wait outside for the train and waited out in the train shed concourse for the
233 train. This was even before the train came in, and I went out on the platform where there were several other people."

Do you remember him making that statement?

A. Yes, sir; I recall definitely that he made that statement to me.

Q. And then next:

"Then I noticed a redcap. I don't know whether it was my redcap or not. It looked like mine, and looked for my bags on his truck but didn't see them, so I said to him; 'Are you 71' and he didn't answer me. Maybe he didn't hear me as he was busy checking numbers on the cars. I don't know if it was 71 or not. Then the train came in, and I got on the train before the crowd."

A. Yes, sir; he made that statement also.

Q. Did Mr. Mintz at any time during that interview that you had with him that morning claim that he had said to redcap 71, Mr. Rettig, that the bags were valuable?

A. No, sir, he did not.

By Mr. Roemer: You may cross examine.

Cross Examination by Mr. Magid.

234 I said that the Union Station employs redcaps for the convenience of both the carriers and the people using the station. I don't know if the Chicago Union Station Company is an Illinois corporation. I am the Sta-

tion Master. I am not classified as an officer. I have
235 had access to the operating agreements but they are along a different line from the corporate agreements. I am not conversant with what the ownership is. As employees we act as agents for other railroads using the station service. I am on the payroll of the Union Sta-
236 tation Company, and am paid by it. I receive my orders from the general manager of the Chicago Union Station Company.

Q. You don't really know whether the Chicago Union Station Company is an agent of these railroads or not?

A. We are doing work for them.

* * *

We often used that phrase that we act as agents for the other railroads in carrying out their various duties, such as bringing trains in or redcap service.

The redcaps work for the Chicago Union Station Company and not for the railroads. I heard Mr. Mintz
237 make the statement from which Mr. Roemer read in September 1955, approximately a year and half ago.

Q. Do you remember everything that Mr. Mintz said at that time?

A. I said I remembered what Mr. Mintz said from the statements that we have in the office by reviewing the statements.

Q. And that is refreshing your recollection?

A. Yes.

Q. Would you say now, Mr. Carlson, that he did not say anything else?

A. I will say that to the best of my knowledge that everything he said at that meeting in my office with the stenographer present was taken down in substance.

Q. Was the stenographer present during all the conversations you had with Mr. Mintz on that morning?

238 A. Yes, while he was in there.

Q. Did he talk with you at any time prior to the time they went in your office?

A. Outside of standing in front of the counter when he introduced himself to me as Mr. Mintz, and I was looking for him, because I had heard he had flown in from St. Paul, and I invited him in the office, and we went right to the business at hand.

Q. At the time you first saw him standing at that counter, did he tell you anything of what had happened of the two days before?

A. He gave me an outline of what had happened, yes. He identified himself.

Q. He told you about the occurrence of which he was going to complain about; isn't that true?

A. Yes.

Q. Do you recall everything he said to you at that time?

A. I recall him identifying himself to me and telling me that he was the gentleman who had lost the three pieces of baggage.

Q. Did he tell you anything at that time about
239 any conversations or tell you the circumstances of the loss?

A. As I said to you previously in my testimony, I invited Mr. Mintz into the office.

Q. We are talking now before that time.

By Mr. Roemer: Pardon me; but will you give him the courtesy of waiting until he gets through before you put the next question? It will be helpful. Give him a clue as to how far he went, please.

By the Witness:

A. (Continuing) I invited Mr. Mintz into my private office when he had introduced himself as the gentleman who had lost the suitcases so that we could get the facts

in privacy and also that I could have the representatives of the Police Department present.

By Mr. Magid:

Q. Did Mr. Mintz, prior to the time you took him into your private office, give you any of the details of the occurrence on September the 11th?

A. He did not, sir.

By Mr. Magid: May I have the deposition for a minute?

By Mr. Roemer: Sure.

By Mr. Magid: Where is the Exhibit No. 2?

By Mr. Roemer: Help yourself.

By Mr. Magid:

Q. Mr. Carlson, will you look at Defendant's Exhibit No. 2, and read it at the point where Mr. Rettig enters?

A. May I look at the front page?

Q. Yes.

A. Yes, sir.

Q. And will you read the statement? You heard Mr. Rettig give his statement that morning, did you not, on the same morning?

A. Yes.

Q. Will you read that statement and tell the Court whether or not that was all Mr. Rettig said that morning?

By the Court: You heard it read, didn't you, a moment ago?

By the Witness: Yes, I heard it read.

241 By Mr. Magid:

Q. Did Mr. Rettig say anything more?

A. At that time he didn't say anything more.

Q. He didn't offer to tell you other facts or circumstances involving this loss, and you did not tell him, "That is not necessary for this record."?

A. I had no such conversation with Mr. Rettig, because what I was after was facts to, if possible, recover the suitcases or the culprit that stole them.

Q. Did Mr. Rettig state the following? This is during the statement, at the time he was giving you the statement?

"I would say at the time I entered what might be considered irrelevant statements, statements which I thought were important to the case, so far as it was an investigation into the loss of my responsibility with the bags, statements which I thought in some way might possibly defend my position, statements which were said to be not necessary."

Do you recall Mr. Rettig making any such state-
242 ments at that time?

A. I don't recall that.

Q. Do you recall telling Mr. Rettig that statements of that nature were not necessary to that proceeding?

A. I don't recall making such a statement to him.

Q. Would you say that Mr. Rettig was telling the truth if he were to say as follows?

"Mr. Carlson didn't tell me, but he made a general statement to the parties present that 'This we don't need on the record,' and I made an effort, though not verbally, or to myself, as I was supposed to be defended by our Union Representative, and he gave no indication and said, 'Let it ride.'"

Did you make the statement at that time, "This we don't need on the record."?

By Mr. Roemer: I object to the form of the question, asking him to characterize whether another witness was telling the truth or not.

By the Court: Sustained.

243 By Mr. Magid:

Q. Did you say at any time during the proceedings with respect to anything Mr. Rettig said, "This, we don't need on the record."?

A. Before answering your question, what record do you quote from?

Q. I am just asking whether you heard Mr. Rettig make such a statement, or whether you made such a statement in response to anything Mr. Rettig wanted to say?

A. I don't recall making such a statement.

Q. Is it possible you might have and don't now remember?

A. I don't recall making the statement,

Q. Did you interrogate both Mr. Mintz and Mr. Rettig at that time?

By the Court: What is that?

By Mr. Magid:

Q. Did you interrogate both Mr. Mintz and Mr. Rettig at that time on the morning of September the 15th?

A. I had them both present.

Q. Did you ask them questions?

A. Yes; I asked both of them questions.

244 Q. Do all of the questions that you asked appear on this statement of either of them?

A. The interview with Mr. Mintz and also with Mr. Redcap Rettig was propounded by me more or less in the form of questions, but that was to draw out statements so all the questions that I asked or statements that I made are not on here. They were formulated in order to draw out statements from both men.

Q. So that the entire proceedings are not contained in this statement?

A. I cannot testify as to that. You would have to—that would have to be determined.

Q. You were present at the time, weren't you?

A. I said the question and answer statement is not all there.

Q. Did Mr. Rettig make any statement at that time

about the fact that the Union Station was shorthanded of redcaps?

A. I don't recall that, outside that he said there were nine redcaps working, and that was the usual complement of redcaps for regular evening work.

Q. Did he make any statement with respect to
245 the fact that other redcaps had given up baggage without requiring the surrender of baggage stubs?

By Mr. Roemer: I object to that, if your Honor please.

By the Court: Sustained.

By Mr. Roemer: There is nothing in the deposition, as I recall, in which that witness claims he said that at that interview.

By Mr. Magid: That is all.

Redirect Examination by Mr. Roemer.

Q. Mr. Carlson, just one question.

A. Yes, sir.

Q. Does this memorandum which has been marked, or report which has been marked Defendant's Exhibit No. 2, for identification, contain all of Mr. Rettig's answers to your questions to him to tell what happened on the date of loss?

A. Yes, it does.

By Mr. Roemer: That is all. Thank you.

(Witness excused.)

By Mr. Roemer: Your Honor, I would like to
246 offer in evidence the deposition of the witness Raymond C. Rettig.

By the Court: Very well. Would you like to take a few minutes recess?

(Thereupon a short recess was taken.)

By Mr. Magid: If the Court please, I would like to state for the record that although this witness whose deposition is now going to be read by Mr. Roemer is present

in Chicago and could have been present here, I have no objection to that deposition going in evidence.

By Mr. Roemer: Thank you. The deposition of Raymond C. Rettig taken by the Plaintiff before Pearl Helland, a Notary Public of Cook County, Illinois, at the office of Weissenbach, Hartman, Craig & Okin, located at 7 South Dearborn Street, Chicago, Illinois, Suite 1630, at 2:30 o'clock p.m. on January 18, 1957, pursuant to the subpoena attached hereto and pursuant to the Rules
247 of Civil Procedure for the United States District Court.

Appearances for the Plaintiff, Messrs. Weissenbach, Hartman, Craig & Okin, by Mr. Harry Okin and Mr. Cecil E. Magid, on behalf of the Plaintiff; Mr. Robert H. Bierma and Mr. P. J. Cronin, by Mr. Erwin W. Roemer and Mr. P. J. Cronin, on behalf of the Defendant.

"RAYMOND C. RETTIG called as a witness by the Plaintiff, having been first duly sworn, was examined, and testified as follows, to-wit:"

Then Mr. Okin makes a statement for the purpose of the record that I think we can omit, showing it was taken pursuant to notice and so on.

"*Examination by Mr. Okin.*

"Q. What is your name, please?
A. Raymond C. Rettig.
Q. Where do you live, Mr. Rettig?
A. Cicero, Illinois. The address?
Q. Yes.
248 A. 3212 49th Avenue.
Q. By whom were you employed on September 11, 1955?
A. Chicago Union Station Company.

Q. In the city of Chicago?

A. In the city of Chicago.

Q. And in what capacity were you working for them?

A. As a redcap.

Q. At the station?

A. At the station.

Q. And how long had you been in the employ of the company at that time?

A. Approximately two and a half years, under temporary employment.

Q. Continuously?

A. Not continuously; summers. My last tenure of employment there was from April 15th, 1955 to the occurrence of this September 13th or 11th, 1955.

Q. And are you still in the employ—

A. No, I am not.

Q. —of the Union Station?

A. No, I am not.

249 Q. When did you leave their employ?

A. I was told at the time of the first investigation that I was put out of service. It is a Union Rule or Railroad Rule I was put out of service pending investigation.

Q. You are still out of service—

A. I am out of service.

Q. —with the Union Station?

A. With the Union Station Company.

Q. Are you otherwise employed?

A. Yes, I am.

Q. By whom are you employed now?

A. Employed by Railroad Transfer Service. Address?

Q. How long have you been in its employ?

A. Since October 10th, 1955.

Q. Directing your attention to the date of September 11th, 1955, were you at that time designated as redcap No. 71 by your employer?

A. That is correct.

Q. And on that date do you recall the circumstances under which you received some bags from one Harry Mintz?

A. I don't recall all the circumstances. I recall
250 the occurrence, the incident.

Q. Will you please tell us for the record just what occurred, as you recall it now, on that date, and at what place it occurred, and all the facts that you can recall in connection with it?

A. I would like to make it known that all the facts that were probably my first statements. I can't remember as to minutes or hours of the day.

Q. Do as well as you can, and then if it is necessary, we will try to supplement your present recollection.

A. All right. At that time I was working from 2:30 to 11:30.

Q. 2:30 p.m. to 11:30 p.m.?

A. 11:30 p.m., yes. After dressing in my redcap uniform, I went up to the main floor, the concourse of the Chicago Union Station and saw the Captain of the—it was called the North Side Group of Redcaps which handled the Chicago, Milwaukee & St. Paul trains. This was my usual assignment on starting work for the day.

I was told to meet the Chicago, Milwaukee & St. Paul train No. 6, I believe it is. I believe the arrival time
251 was 2:40, or I believe it was 2:40. I met this train and accepted baggage for passengers to be brought up to the station, to the cab stand.

Upon bringing these bags up to the cab stand, the parties owning the bags reported to me and claimed their baggage.

My truck was empty. I was asked by Mr. Barton, Roy Barton, the Chief Redcap, to load the 4:00 o'clock Burlington train to the Twin Cities, St. Paul and Minneapolis.

The train number is 23. This wasn't my ordinary assignment, as Mr. Larry Heenan was the redcap on that job. Mr. Heenan was sick that day, or it was his day off, either of the two. In lieu of his absence, I was asked to take care of the train.

This was about 3:15, 3:20, approximately that time of the day. I took my truck over to the end of the lockers facing the north side cab entrance. I proceeded taking baggage, as there was a party there waiting for me. I accepted baggage from the party, eight bags for the Parlor Car on this train.

At the time I was asked to carry these bags and
252 load them for these people, another man came to me, asking that I carry his three bags. I told this man to wait a moment, I am busy now, I will come to him after I get the car number and the space of this party I was now taking care of.

After I did that I accepted the bags of this gentleman. There were two fibreboard bags and personal effects bag. It would be a two-suiter, to my knowledge.

Q. Pardon the interruption, but did those bags have any special significance to you?

A. None whatever.

Q. Did you know that they were sample case bags?

A. I have seen these bags carried by a variety of people. In the terminology of the redcaps, they are called sample cases. Salesmen will handle them, but boys take them to school for laundry, different people, and they can be used for all purposes.

Q. These are the same bags that you referred to in the statement you gave in the first investigation of this matter by your employer?

A. That is correct.

253 **Q. Did you issue stubs or receipts for the bags at that time to the person from whom you took them?**

A. Yes, I did.

Q. I show you what is marked for identification Plaintiff's Exhibits 1, 2 and 3, and ask you to state whether these are the tickets that you issued to the person from whom you received the bags?

A. Yes, I could say these are the tickets.

Mr. Okin: Will the Reporter please mark them respectively Plaintiff's Exhibits 1, 2 and 3 for identification as of this date?

(Documents so marked.)

Q. Now, then, upon receiving the bags, tell what occurred thereafter.

A. After giving the gentleman who owned the three bags his receipts, I went into a little bit about the information he would need to claim these bags, and I was told he had made this trip before and it wasn't necessary.

I then proceeded to load other bags. Actually, this loading process requires a little explaining, I think. When
254 I accept bags for that train especially, I issue receipts to the parties owning the bags, and these bags are left on the floor until loading time comes. This would be the loading of my truck.

This is done to actually aid my loading of the train. I load these trains from the Parlor Car to the head coach, which are the short stops. So it facilitates much easier handling, and it is more efficient and faster, as this train was known not to give the redcap much time to load these bags.

I went on accepting other baggage for loading. The train was scheduled to leave at 4:00 o'clock. The redcap's time for going down to the train, as a rule, was ten minutes before four. It was the custom of the gateman to retain the passengers on the concourse until the redcap had unloaded the bags. Therefore, in that way, there was no interference from the parties traveling in connection with the redcap's operation into the trains.

Q. Tell us what occurred at the time and place without telling what was usual or otherwise. We can take that up later. Tell what occurred.

255 A. Certainly. I went on loading baggage on my truck. I received a few calls from the cab court that there were people waiting for other trains also, but there was a party for this 4:00 o'clock train. I would approximate this time at 4:35—pardon me, 3:35 or 3:40, 3:45. I went out to assist these people.

About this time—well, I will have to give the number of bags. I mean, actually, I had twenty-seven or twenty-eight bags on the truck. This was a full load.

I went out to assist the party that had a number of bags, and I decided this was enough baggage. Any more may mean my not giving correct service or the best service to these people, possibly having to run at the end to put these bags on the train.

Q. What did you do?

A. I went back to my truck. Excuse me, please. In the process, I would say before I went out to the cab court, a gentleman approached me and told me that, 'We are not making the trip', or they were not making the trip; they were going to drive up to St. Paul or

256 Minneapolis, whatever was the destination.

I asked who wasn't making the trip. This gentleman said, 'These three bags', and he pointed out these three bags to me. They were the bags I remembered were given to me by the first party.

Q. That was the party that you have previously identified—

A. That is correct.

Q. —as Mr. Mintz, the person to whom you had given the three checks which you have already testified about?

A. That is correct.

I told this party that it is our procedure to get our

claim checks, and that if he doesn't turn over the claim checks he will have to send to St. Paul for the bags, because that is where they will be.

I gave him ten minutes. I said, 'I will be here ten more minutes loading this train. If you don't return by that time with the claim checks, or the owner, these bags will be down at the train. I have to put the rest of these on the train.'

I went out to the cab court, picked up the bags I
257 had been loading or been taking care of, and loaded my truck.

I would say four, three, four or five minutes after I had first spoken to this man who wanted the bags off the truck because he was driving to St. Paul, that man returned, saying they were in a hurry.

Upon being asked where the claim checks were, he said, 'My brother is just finishing the call. He will be here.' He said 'Will you please put these bags in the cab for me?'

I remarked there was a shortness of time, if he wouldn't mind going to the north side cab court. This is ordinarily the cab court where the people come into the station, the south side being the one where they go out.

I pulled out the bags he pointed out to me off of my tr[illegible] and unloaded the parlor car baggage first because i[illegible]as on top of this baggage. I took the gentleman—I took the three bags out to the cab court, where there was a Yellow cab standing. The cab driver opened the door. I placed the big bag with the wheels on it, one of these big sample cases, or one of these black fiberboard
258 bags with the wheels on it, in the front.

I stood there with this gentleman awaiting the arrival of the second party for the claim checks, possibly thirty or forty seconds, maybe less. This was outside the double doors of the north side loading zone.

He stood there looking into the station as if—with me, and we were waiting for this other party.

I heard my name called, or my number called by an assistant station master. I believe the name is Emil Reich. Pardon me, we know him as Emil.

Q. I didn't get that name.

A. Emil, that is what we know him by. I was asked to hurry as the train would be in any minute and it was getting close to train leaving time.

So I was standing with this gentleman who claimed these bags were his. My truck was inside the station, and the train was about to leave in the next few minutes.

I sought help, either somebody to watch this man, or someone to take my bags down for me, another red-
259 cap, so that I could remain with this man.

I walked back through the double doors into the station, and I heard the motor, or the reving of this man's motor of his car, and I just happened to turn around and saw this cab pulling away. I went on with my truck load of baggage down there.

This is oftentimes, though not policy, it is required to give up bags without checks. Many times a husband and wife will get out of the train, the husband holding the redcap checks, the bags will come up to the cab stand, the wife will come for the bags and upon being asked where the check is, her husband speaking to somebody else, or in a phone booth, and they are in a hurry, the redcap either remembers the fact or the customer, remembers the situation, or in the distance can see the husband standing, and will release the bags.

Especially this is important for this train, as this is the only train that I have loaded in my employment at
the Union Station where we didn't get back our claim
260 checks. It was standard procedure to put the bags on the train and you never saw the customers come.

Q. Are you instructed to recover the claim check for identification?

A. We are instructed to recover the claim check for identification.

Q. You were so instructed, I presume?

A. Not on this train. It was procedure, as I say. I was never instructed except by observing the other man who had loaded the train, Mr. Heenan, and others, who told me you don't have time because you don't see the customers again. The bags are put on the train before the customers come down, ordinarily.

Q. But in this instance you did not receive any claim checks from the person to whom you gave the bags?

A. That is correct. No. Of course, I had no knowledge—

Q. —who he was or—

A. —who he was.

Q. What?

A. Or what his intent was, or anything.

Q. Just a moment. I want you to recite what was 261 done and what occurred.

A. All right. Certainly. When this cab pulled away from the station, containing these three bags and this party who claimed they were his, or claimed they were his brother's I immediately went to my truck and took the truckload of baggage down to this train.

The gate man—passing a group of people on the concourse, the gate man opened the gates for me. I was instructed to hurry, the train was going to leave any second, any minute.

I ran down, unloaded the baggage, completed my run, took all the bags off my truck, loaded them in the proper cars, and returned as the train pulled out, with an empty truck load. My job was done for this train.

I will go on to the night I was notified of this.

Q. Did the passenger to whom you had given the stubs for the baggage talk to you—

A. Not to my knowledge.

Q. —on that day?

A. Well, except for the original contract to carry the bags.

262 Q. Did he talk to you at any other time on that day?

A. I can't recall speaking to anyone on the way down. I was in too much of a hurry. There were people out—quite a crowd, in fact, waiting for the train gates to be opened so they could board the train.

Q. Now have you fully stated all that occurred in connection with the three bags which were given to you and in return for which you had given the three checks marked Exhibits 1, 2 and 3 for identification?

A. I would say that is about all there is to it.

Q. At that time and place?

A. At that time and place.

Q. When again did you have occasion to discuss the occurrence of the receiving of the bags and delivering them to this person for whom you placed them on the cab that you described?

Mr. Roemer: Just when, now?

Mr. Okin: Yes.

Q. When did you have occasion to again discuss this occurrence?

263 A. In full?

Q. Yes.

A. At the first investigation.

Q. Where was that?

A. In the Chicago Union Station, station master's office.

Q. And do you remember the date that that took place?

A. It would be the 13th.

Q. Of September?

A. I am quite sure. It was a Tuesday.

Q. The 13th of September. 1955?

A. That is correct.

Q. Who was conducting that investigation?

A. Mr. Walter Carlson, station master.

Q. At that time and place Mr. Mintz was present, was he not?

A. That is correct.

Q. And you identified Mr. Mintz as the person to whom you had given the three checks which you have already told us about?

A. That is correct.

Q. And at that time and place you related in detail the facts and circumstances of the occurrence in ques-
264 tion, concerning which you have just made a statement, did you not?

A. To the best of my knowledge, yes.

Q. You gave them the facts and circumstances to the best of your knowledge?

A. To the best of my knowledge.

Q. At that time you described the bags in the following language—

Mr. Roemer: Don't answer this until I have a chance to object.

Mr. Okin: Q. Did you use this language in describing the bags: 'There were two black sample cases made of fiberboard, one of which had wheels. The bottom section with wheels had straps. The top section had a hard handle. The other item was a brown two-suiter bag.'

Was that the description you gave of the bags at that time and place?"

By Mr. Roemer: I will withdraw my objection.

By Mr. Magid: I can't know, Mr. Roemer, what pages you are turning over.

By Mr. Roemer: Only the discussion between Mr. Okin and me on the objection which I have withdrawn.

By Mr. Magid: To that particular statement?

By Mr. Roemer: To that particular statement.

By Mr. Magid: All right.

By Mr. Roemer: There is quite a bit of colloquy there.

By Mr. Magid: Will you tell me what pages you are omitting?

By Mr. Roemer: Gladly. I am omitting from my objection on page 19 to the answer of the witness on page 22.

"The witness: I understand my position to be neutral, and that the deposition is merely the statement under oath that was given at a previous time. I affirm the statement.

Mr. Okin: Q. You affirm the statement that you made at the time—

A. I affirm the statement.

Q. —that you made to the station master on September 13, 1955, whatever that is. Would you now say that the statement you made there was the truth, as well as you were able to remember it then and the statement you have made here now is the truth as well as you are able to remember it now?"

By Mr. Roemer: There were more objections, which I shall probably withdraw. So we get that again, those are the objections on pages 23 and 24 where Mr. Okin says,

"Before I proceed any further, I want to offer in evidence as Plaintiff's Exhibit 4 for identification, a photostatic copy, being a transcript of the examination of this witness and his statements taken September 13th, 1955, which has been furnished to us as a complete and accurate statement of what occurred at that examination, and I show this to you, Counsel, to have you state whether

or not you don't have in your files a duplicate copy of that, or other evidence of the existence of this statement, of what occurred at the time and place that this witness has referred to."

Mr. Magid inserted this morning that photostatic copy, your Honor, and I have no objection to it going in evidence, and so we can skip all of that.

267 By the Court: Very well.

By Mr. Roemer: That will skip in the deposition from the objection by me, Mr. Roemer, through—

By Mr. Magid: What page?

By Mr. Roemer: Page 25 to page 28.

"Q. I will ask the witness if he had any trouble reading the photostatic copy or whether it was clearly legible to him for reading.

A. It was clearly legible.

Q. Does that statement which you read of your statement at the time and place, is that correct and true as nearly as you can recall it now?"

By Mr. Roemer: There is an objection on page 28 which I will omit, and the next answer will be on page 37.

By Mr. Magid: That portion from 28 to 37—

By Mr. Roemer: Is just colloquy between Mr. Okin and me.

By Mr. Magid: All right.

By Mr. Roemer (Reading):

"The Witness: A. I would say at the time I entered what might be considered irrelevant statements, state-
268 ments which I thought were important to the case—"

By Mr. Magid: I think just before that portion, there is a question propounded by Mr. Okin with respect to which that answer was given, and your objection intervened there, and I wonder if you could go back and find the question to which that answer relates?

By Mr. Roemer: Why don't I go on, and then if you want anything else from here, I will be glad to read it.

By Mr. Magid: All right.

By Mr. Roemer (Reading):

"The Witness: A. I would say at the time I entered what might be considered irrelevant statements, statements which I thought were important to the case, so far as it was an investigation into the loss of my responsibility with the bags, statements which I thought in some way might possibly defend my position, statements which were said to be not then necessary.

Q. Will you please now state for the record what you then stated and what is the statement that you now
269 wish to make for the record?"

By Mr. Roemer: Again there are objections on page 37 that will be omitted, and on 38 resuming.

"A. The statement I have to make is in regards to the circumstances surrounding, to my knowledge, as being a victim of this confidence man, this thief. These may be considered irrelevant by some, but to my knowledge they are important for my part only.

At the station on September 11th, being the end of summer, the people returning from vacations, people going on vacations, students going to school, trains coming and going at that time of day, the busiest time of day in the Chicago Union Station, there were approximately we will change that approximately—numerous people in the station at this time.

I sought at the time, which is implied at the end of my statement, I walked back into the station actually looking for aid, someone that could watch my suitcases, another redcap that could take my suitcases to the train for me, to perform the services for these other people
270 whose twenty-five or twenty-six bags I had remaining on my truck, or someone to watch the party who claimed these bags, the man without the claim checks.

There was no help I could call on. I felt my duty at the time, not feeling any sort of knowledge of this man's guilt or that he had planned anything maliciously, or theft, or anything of the sort, I had bags I was called to deliver to the train by the assistant station master, Emil.

That is all I had to say with regard to other additions to the statement.

Q. Were you short of men on that day?

A. We certainly were.

Q. How many men were there, to your knowledge, short—

A. To my memory—

Q. —for the loading of that train?

A. One man for the loading of that train.

Q. And how many men shortage in the service of the Union—"

By Mr. Roemer: There is an objection there.

"Mr. Okin: Q. How many men short were there in the station on that day?

271 A. I don't know the exact number. I know three men that laid off that day.

Q. Who was it you asked for help on that day?

A. I could find no one to ask for help.

Q. Oh. Did you go over the facts which you have here testified about with Mr. Roemer?

A. No, I didn't. My appointment with Mr. Roemer was merely to tell me to answer to the best of my knowledge today and to acquaint me a little with what was to happen with respect to this deposition.

Q. Did he cover your statement in any way of what you would testify to here?

A. Yes, he did. He read over the statement.

Q. What statement did he read—

A. The statement—

Q. —over to you?

A. —in essence. Well, the statement in exact—

Q. The copy?

A. The copy or the photostat.

Q. Or the photostat?

A. That is correct.

Q. Did you tell Mr. Roemer today that you had also made a statement to other people regarding this incident?

272 A. No, I didn't for the reason that I didn't think it was what you would term part of the statement. I forgot all those other things, forgot to mention them at the time. I had mentioned them, pardon me, and I had been told they were not necessary to my case, and for that reason I considered them not part of the statement.

Q. Did you tell Mr. Roemer what you desired to state there that you were told wasn't part of the case?

A. No, I didn't. No, I didn't.

Q. Did he ask you what you desired to state?

A. No, he didn't.

Q. Did he ask you whether you had stated at any time to anyone that you knew it was wrong to give the bags to any person without a claim check, but that you had seen other redcaps do so and that you were busy and shorthanded, and that is why you delivered these bags without getting the claim checks?"

• • •

"The Witness: If this just boils down to the fact that I did the best I could, that is true. That is the only way I could answer it.

273 Q. Did you at any time make the statement that I referred to to anyone, to Mr. Roemer or to anyone else?

A. The statement being the one I just added supplementarily?

Q. No, the one I asked you if you made.

A. Will you kindly repeat it?

Mr. Okin: I will ask the Reporter to read it again.

The Witness: Thank you.

(Question read by the Reporter.)

The Witness: A. I wasn't asked this question.

Q. Did you at any time make such a statement to anybody, anywhere?

A. Yes."

* * *

"Q. To whom did you make such statement?

A. To the redcaps after the investigation. I am not quite sure if I said those exact words, but Mr. Magid served me with the subpoena and at the time I told him this. I told this to various people in explaining my involvement in this case, in this situation.

Q. You told that to Mr. Carlson too, didn't you?

274 A. I told it to Mr. Carlson.

Q. And that was when Mr. Carlson told you that that wasn't relevant to your situation?"

By Mr. Roemer: We go to page 44.

"The Witness: A. Mr. Carlson didn't tell me, but he made a general statement to the parties present that 'this we don't need on the record', and I made an effort, though not verbally, or to myself, as I was supposed to be defended by our Union representative, and he gave no indication and said, 'Let it ride.' "

By Mr. Magid: What page did you skip?

By Mr. Roemer: Page 44. Then there is quite a bit of colloquy here before we get to the witness again. This is page 46.

"Mr. Okin: Q. When Mr. Magid served you with a subpoena and you were discussing with him after the service of the subpoena the circumstances surrounding this matter in part, to the extent that you did, did you at that time make this statement to him, and listen to it:

275 'I could tell from the type of bags that Mintz carried and delivered to me that he was a saleman and that his bags contained his samples, but I couldn't tell what kind of samples they were, but I was sure that they were valuable at least to him.'

Did you make that statement?

A. I don't remember making the statement. I am sure they were valuable at least to him. I mean, tooth brushes would be valuable to a tooth brush salesman if he were selling them.

Q. What was the statement you made?

A. I referred to the sample cases. I said I could tell just by process of elimination that they couldn't be students bringing dirty clothes to or from school. They were sample cases, according to redcap's terminology, containing samples, although I have seen all sorts of people, women and men, carrying this fiber case. It is a rather cheap substantial bag. It does the job. I said this because of his appearance, his carriage and dress, and everything, I would say he was a salesman. That is the only reference I can make to that.

Mr. Okin: All right. That is all, Mr. Rettig."

276 By Mr. Roemer: Then the witness said he wanted to make a statement, and said "This does not have to be in the record." That is on page 47, and we next go to—

By Mr. Magid: "This does not have to be in the record." You insisted it be on the record at that time.

By Mr. Roemer: All right.

"I would rather it wasn't. Is it customary, I have no knowledge of this field whatever, is it customary, for a man in the jewelry business—

Mr. Roemer: Wait a minute, is it customary—

The Witness:—to carry such huge cases? I mean, I know there must be filing or there must be smaller con-

tainers. This could be. But these bags, to my knowledge, would be, just to my novice knowledge, it would be anything but what they were, what they would contain, from my remembrance. That is based on no fact whatever because I don't remember it that well.

Mr. Okin: I don't wish to show you any disrespect, Mr. Rettig, but, of course, any discussion between you, as a witness here, and me, as counsel for the plaintiff, is not the purpose of this proceeding.

277 The Witness: Certainly, I understand that."

By Mr. Roemer: Then there is more colloquy. You wanted the last in, and I don't object to it.

By Mr. Magid: All right.

By Mr. Roemer: Page 49—that is off the record. Is that the last you have in your digest of it?

By Mr. Magid: Only one thing—

By Mr. Roemer: Wait and let me see if there is anything else here on the record.

Page 49, Mr. Okin says:

"Just a moment, and then we will get off the record and we can talk.

The Witness: That is fine. I am waiting to get off the record.

Mr. Okin: That is fine. We can get off the record and talk all we want."

By Mr. Roemer: But that means later on getting off the record.

"Then I think for the record I would like to ask you a few more questions as to just where you are located, so that if we want to get you for the signature, we will have no difficulty.

278 Q. Will you please state where you are living at the present time?

A. I live at 3212 South 49th Avenue, Cicero, Illinois.

Q. Do you have a telephone there?

A. Yes, I have. Olympic 2-1693.

Q. Whom do you live with there?

A. My wife and my child.

Q. You are married?

A. Yes, I am.

Q. You live with your wife and child?

A. Yes.

Q. Are you engaged in any other occupation than that which you referred to as being employed with the Transfer Company?

A. No other occupation, I don't think you would call it; avocation. I am a full-time student in school.

Q. Where are you a student?

A. At Loyola University.

Q. How long have you been a student at Loyola University?

A. I have been a student at Loyola University since September, 1954.

279 Q. I see. You are still attending there as a student?

A. I am still at Loyola, yes, sir.

Q. Any particular specialty?

A. I am majoring in marketing in business school.

Mr. Roemer: What?

The Witness: Marketing and business school.

Mr. Okin: Marketing and business school.

Q. Where can you be reached in the day time, Mr. Rettig, other than your home is what I am trying to get at?

A. I would have to know—that is difficult to say.

Q. At your place of employment, for one place?

A. No, it would have to be at school.

Q. At school?

A. Although next week I am going to be off. We have examinations next week.

Q. When do they begin?

A. Examinations for me began today. I had one. I will have two Wednesday.

Q. Of next week?

A. Next week, Wednesday, that will be the 23rd, and I will have two or three the 25th.

Q. In between those times you can be reached at school?

A. At home.

Q. At home?

A. Before 2:00 o'clock in the afternoon, and I work at three different places.

Mr. Okin: Now, we will go off the record."

By Mr. Roemer: And then the deposition is signed by Raymond C. Rettig, and Mr. Magid acted as commissioner and signed the certificate. I take it this exhibit will be physically attached to it?

By Mr. Magid: Yes. There is also in that the reference to those three claim stubs which I introduced in evidence separately.

On page 36, this question was omitted. That is the one I referred to, and it begins at the bottom, and then the colloquy begins after that. You read the answer to that, but you didn't read the question.

By Mr. Roemer: I did read the answer, but I didn't read the question?

By Mr. Magid: That is right.

By Mr. Roemer: The question on page 36 which Mr. Magid has been good enough to call to my attention at the bottom of the page is:

"Q. Is it not a fact that you had certain additional information which you supplied Mr. Carlson, but which he told you wasn't a part, necessarily a part of the statement you made?

The Witness: A. I would say at the time I entered what might be considered irrelevant statements, statements which I thought were important to the case, so far as it was an investigation into the loss of my responsibility with the bags, statements which I thought in some way might possibly defend my position, statements which were said to be not necessary."

By Mr. Magid: The rest of it you read.

By Mr. Roemer: I want to offer also, your Honor, the statement, and he said he had no objection to this entire statement of Harry L. Mintz made to the insurance carrier going into evidence, and I offer that as Defendant's Exhibit No. 1.

282 By the Court: Very well, it may be received.

By Mr. Magid: No objection.

By the Court: It may be received.

(Said document, so offered and received in evidence, was marked Defendant's Exhibit 1.)

By Mr. Roemer: We rest. Pardon me, I did not offer in evidence Defendant's Exhibit No. 2, your Honor, and I want to offer that in evidence at this time.

By the Court: It may be received.

(Said document, so offered and received in evidence, was marked Defendant's Exhibit 2.)

By Mr. Magid: In order that I won't overlook anything, I would like to reoffer the exhibits at this time which I believe were received in evidence before.

These are Plaintiff's Exhibits 1, being the so-called stock book; No. 2, the Group Exhibit 2, being the inventory of June 25, 1955; Exhibits 3 and 4 were withdrawn, and Exhibit No. 5, being this loose leaf book,

283 containing the inventories of Abramson, Ostrow & Samit and S. & D., K. & S., and Exhibits Nos. 6, 7 and 8 which are the stubs received from the redcap, Exhibit No. 9—

By Mr. Roemer: What did you say received from the redcap?

By Mr. Magid: The stubs of the tickets received from the redcap.

By Mr. Roemer: Mr. Magid, you did offer all of those things in evidence.

By Mr. Magid: I am just making sure.

By Mr. Roemer: If either one of us should have to make a record, you would have to put in these exhibits twice.

And Thereupon The Defendant Rested Its Case.

By the Court: How much time do you think you will want?

By Mr. Roemer: Not over forty minutes.

By Mr. Magid: I think I can do it within that time.

By the Courtr: I should think forty on the side
284 ought to be sufficient, and I will have one or two cases pressing me in the morning.

By Mr. Magid: Would I have an opportunity to close in the usual way?

By the Court: Make a fair opening.

By Mr. Magid: All right, sir.

(Thereupon an adjournment was taken in the above-entitled cause to Friday, June 7, 1957, at the hour of 10:00 o'clock a.m.)

285-394 * * *

395 By the Court: * * * As far as I can see, the case before the Court is ruled by this Michigan Central Railroad Company against Carroll in 75 Ill., Page 348.

If I understand the situation with this Union Station Company and railroads and station companies similarly situated they do not hold themselves out as providing ushers to transport currency or jewelry or articles of very great value.

On the other hand, they hold themselve out to transport hand baggage such as those things which are ordinarily carried by travelers, a bag containing some clothes, shoes, maybe some underclothing and a brush and comb and some other things necessary for the traveler to have.

I think it was a constructive fraud on the part of this insured to attempt to carry $36,000.00 worth of jewelry on the train without paying for its carriage and to seek to have it transported by the redcap. I don't think the insured told the redcap, "Be careful of that; it is valuable." That wasn't his state of mind. He probably did tell him, "Be careful; that one case will roll off your 396 truck," but I don't believe he told that redcap that that bag was valuable, because that wasn't the state of mind he was in.

He wanted to carry a valuable lot of merchandise for nothing from Chicago to Minneapolis.

By Mr. Magid: But, your Honor—

By the Court: I never allow anybody to interrupt me. Don't do that.

By Mr. Magid: I thought you were looking at me.

By the Court: I may look at you, but I don't wish you to talk after I start to talk.

By Mr. Magid: I didn't mean to interrupt, your Honor.

By the Court: I think the state of mind of the insured was that he wanted to get his package of jewelry, which he says was worth $36,000.00 from Chicago to Minneapolis without paying what would ordinarily have been the charge for its transportation, the insurance of it against loss.

Therefore, he did not—and I am just as sure of that as I am sure of anything about this case—tell that redcap that that bag was valuable. And when he made his statement on the following Tuesday in the Union Station,

he didn't say that he said that, and when he pre-
397 sented his statement to the insurance company, he didn't say that he said that.

The result of that is that I don't think there was a contract of bailment, and further, what happened when that bag disappeared wasn't any different than though it had been taken off by stealth when the usher wasn't about, not a particle of difference.

A man came up and said, "We are not going by train. We are going by automobile. We are going to drive up. My brother is telephoning" and, in effect, he said, "We want to take those bags out to the cab. We are not going by train."

The usher demurred but was persuaded. Here he had a truckload of baggage to go out to the Burlington train, and he thought his customer had changed his mind and didn't want to go by train, so he was torn between a desire to get the baggage to the train and a desire to accommodate these men who had changed their minds and were not going to use the train.

He was tricked into taking the baggage off his truck.

He was tricked into putting it into an automobile, and
398 when he turned around to get somebody to watch the merchandise in the automobile or to take the truck to the Burlington train, the purported brother drove off.

I can't see a particle of difference in principle, between that and than if that man or some other man had come up, that alleged brother had come up and by stealth taken the three bags off the truck, not a particle.

He didn't intend to deliver those bags until he got his checks, and they were stolen from him while he was engaged in a natural effort to accomodate accommodating the traveling public.

If the situation were such that I had to render judgment for the plaintiff I would have very great concern,

very, very great concern about the amount of that judgment. He says the jewelry, the watches and rings and diamonds and earrings were worth what, $36,000.00?

By Mr. Magid: $34,600 and something.

By the Court: The plaintiff says that?

By Mr. Magid: Yes.

By the Court: There is evidence that the insurance company paid that sum of money to the owner of this property, but the value of that merchandise, if I were called upon to pass on it, it would give me pause. If I were called upon to say how much he lost, I would
399 be disturbed. He did say that his stock was worth about twenty or twenty-one thousand dollars. He said that on a paper which I think is undated, and he signed it.

That is, the insured signed it, Mintz, and attached to that now are two sheets of paper, not signed by Mr. Mintz, but signed by the firm of insurance adjusters, and when I first heard that paper read, I thought that Mintz was telling the value of the goods, the value of all the goods in his cases.

At any rate, I don't have to worry about that. I don't think there can be any recovery, and I don't think there should be any recovery, but if there were to be recovery, I tell you I would be disturbed about the amount of any recovery in excess of twenty or twenty-one thousand dollars.

I don't think it is necessary to say anything else unless there is some matter I have overlooked and I should cover, and you may call my attention to it.

By Mr. Magid: Anything else might be construed as an argument. I don't mean to argue with the Court.

By the Court: That is the best I can do with it,
400 gentlemen.

By Mr. Magid: Are you going to take this under

advisement?

By Mr. Roemer: The Court has announced a decision.

By the Court: I am through with this, I hope, until it comes back to me; if it ever does, and I don't think it will. If I thought it were going to come back, it wouldn't go away now.

By Mr. Magid: Well, I may try that, your Honor.

By the Court: Bring in findings of fact, conclusions of law and a judgment order.

By Mr. Magid: When you do that, will you submit a copy to me?

By Mr. Roemer: Sure.

401 * * *

402

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 1438) * *

Findings Of Fact And Conclusions Of Law entered June 18, 1957 as follows:

This cause having come on for trial, and the Court, having heard the evidence presented by the respective parties, the arguments of counsel, and being fully advised in the premises, finds:

1. On Sunday, September 11, 1958, Harry L. Mintz went to the Chicago Union State about 4:25 p.m., (CDT), to take Train No. 23 on the Burlington Route, scheduled to depart from the station at 5:00 p.m. (CDT).

2. Harry L. Mintz delivered to Redcap No. 71, one Raymond C. Rettig, one (1) brown two-suiter bag, and two (2) black fibre sample cases containing jewelry. The two fibre cases, which fitted together, had wheels on the bottom, and the top section had a hard handle. Harry L. Mintz received from the redcap baggage checks Nos. 792319, 792320 and 792321.

3. At the time Harry L. Mintz turned over the three bags to the redcap, he did not inform the said redcap, or any other employee of the defendant, that the two 403 black sample cases contained jewelry. The only statement made by the said Harry L. Mintz to the said redcap was "Be careful in loading that one case so it doesn't roll off your truck." This admonition was given by Harry L. Mintz because of the wheels on the bottom of the combined sample cases.

4. The sample cases, according to Harry L. Mintz, contained about $35,000 worth of jewelry.

5. About 4:40 o'clock p.m. (CDT), redcap No. 71 had about 27 or 28 bags on his truck, which was a full load. About that time a man approached him and said, "We are not making the trip; we are going to drive up by automobile to Minneapolis". The redcap inquired as to who was not going to make the trip on the train; and this man said, "These three bags", and he pointed out the three bags for which the redcap had issued the three baggage checks. The redcap informed the man that he was required to get the claim checks; and that if he did not turn over the claim checks the man would have to send to Minneapolis for the bags because that is where they would be. The man replied that his brother had the checks and was telephoning. The redcap gave the said man ten more minutes to produce the said baggage checks.

6. About five minutes later, the man who wanted the bags taken off the truck because he was driving to Minneapolis returned and said that he and his brother were in a hurry. Upon being asked where the claim checks were, he said, 'My brother is just finishing his telephone call; he will be here. Will you please bring

these bags out to the cab for me?" The redcap
404 directed the man to go to the northside cab court where people ordinarily come into the station instead of the southside cab court where they go out. The redcap then took the three bags covered by the three baggage checks off his truck and carried them to a waiting Yellow cab in the incoming cab stand. The redcap then placed the bag with the wheels on it in the front compartment of the cab; and the man claiming these bags put the suitcase in the rear passenger space of the cab. Then the redcap and the man waited for the return of his brother, who was allegedly telephoning. As the time for the departure of the train was getting very close, the redcap sought to obtain the help of another redcap, either to await the return of the brother or to take the baggage truck of Redcap 71 to the train for the delivery of the baggage to the passengers. As the redcap opened the door leading into the train concourse from the cab stand to look for another redcap, he heard the taxicab starting and saw it pull away.

7. The three baggage checks were not re-delivered to the said redcap or to any other employee of the defendant; and the said jewelry cases were not recovered by Harry L. Mintz or the plaintiff.

8. Plaintiff insured the said Harry L. Mintz, the firm of Ostrow & Sammett, and one, Samuel Abramson, for whom the said Harry L. Mintz acted as a selling agent, against loss of the jewelry contained in the said sample cases; and the plaintiff paid to the said assureds the following amounts:

405	Ostrow & Sammett	$10,884.67
	Samuel Abramson	17,196.00
	Harry L. Mintz	6,525.21
	Total	$34,605.88

9. The defendant operates the Chicago Union Station and furnishes the said redcap service to the passengers of the four railroad companies using the said station: Chicago, Burlington & Quincy Railroad; The Pennsylvania Railroad; The Chicago, Milwaukee, St. Paul & Pacific Railroad; and the Gulf, Mobile & Ohio Railroad, as agent for the said Railroad Companies. The defendant, and the Railroads for whom it acted as agents, did not hold themselves out or undertake to provide redcaps to carry currency or jewelry or articles of very great value. They did hold themselves out and undertake to transport such things as are ordinarily carried by travellers, such as clothes, shoes and other wearing apparel necessary for the traveller's comfort and convenience on a journey, consistent with the traveller's station in society.

10. Both parties contended in their arguments that the relation between Harry L. Mintz and the defendant was that of a bailment; and both parties contended that the law of Illinois governed the transaction. Each of them cited the case of Michigan Central Railroad Company v. Carrow, 73 Ill. 343, and the case of Humphreys v. Perry, 148 U.S. 627, which follows Illinois law, as leading cases.

Based upon these findings of fact, the Court has reached the following applicable conclusions of law:

406 1. The said jewelry contained in said sample cases of Harry L. Mintz, was not part of his baggage as a traveller, but was stock-in-trade, belonging to Harry L. Mintz, Ostrow & Sammett and Samuel Abramson, and in the possession of Harry L. Mintz for purposes of exhibition and sale.

2. Since Harry L. Mintz did not inform the defendant, or any of its agents, that the sample cases contained jewelry in the amount of approximately $35,000, no bailment relation was created between Harry L. Mintz and the defendant.

3. The failure of Harry L. Mintz to inform the defendant or its employees of the inclusion in his baggage of the said jewelry was a constructive legal fraud upon the defendant; and Harry L. Mintz was guilty of negligence in failing to make such disclosure.

Accordingly, there will be a finding and judgment in favor of the defendant; and the cause is dismissed at plaintiff's costs.

Dated at Chicago, Illinois, June 18th, 1957.

Enter:

/s/ John P. Barnes
Judge

407

UNITED STATES DISTRICT COURT
(Caption—No. 56 C 1438)

Motion Of Plaintiff To Set Aside The Findings Of Fact, Conclusions Of Law And Judgment Entered Pursuant Thereto On June 18, 1957, For Errors Contained Therein, And That The Court Make Findings Of Fact And Conclusions Of Law And Enter Judgment Order In Favor Of Plaintiff As Submitted By Plaintiff Herewith filed June 26, 1957 as follows:

(Filed Jun 26 1957)

Plaintiff respectfully moves the Court to set aside the findings of fact and conclusions of law heretofore made and entered by the court in the form as submitted by defendant, and to vacate the judgment entered pursuant thereto on June 18, 1957, and to make findings of fact and conclusions of law and enter judgment in favor of plaintiff as submitted by plaintiff herewith.

As grounds for said motion plaintiff asserts: (a) the findings of fact as heretofore made are contrary to the admissions of fact made by defendant; (b) the findings

are contrary to the uncontradicted testimony of Rettig, contained in his deposition; and (c) the conclusions of law made by the court, as submitted by defendant, are not applicable to the admitted facts and the other evidence in the case.

408

I.

FINDING OF FACT NO. 2, IS CONTRARY TO DEFENDANT'S ADMISSION NUMBER 4, IN EVIDENCE.

The last sentence of finding of fact number 2, as made recites that:

> "Harry L. Mintz received from the red *cap baggage* checks Nos. 792319, 792320 and 792321." (Emphasis ours).

Admission number 4, made by defendant describes that which defendant has denominated as *baggage checks* in said finding, as *identification tags*.

The word "baggage" as employed by defendant in said finding is a purposeful misnomer calculated to imply that the defendant limited its responsibility to the handling of "baggage", as the same is technically defined in the law relating to carriers, in order that such law be made applicable to the facts in the case at bar, which it clearly is not. There is nothing in the evidence which even tends to support such a limitation. Plaintiff's position in this connection is supported by defendant's admission number 2, which admits:

> ". . . said Union Station, employed so-called 'red caps' whose duties were to receive *bags of various kinds* from the travelling public *containing personal property* . . ." (Emphasis ours).

This admission is broad enough to include within its purview any and all kinds of receptacles and any and all

kinds of personal property, and is not limited to "baggage" as the same is defined in the law of carriers and passengers.

409

II.

FINDING OF FACT NUMBER 3 IGNORES THE TESTIMONY CONTAINED IN THE DEPOSITION OF RED CAP, RAYMOND C. RETTIG.

Although the court saw fit to conclude that at the time of the delivery of the sample cases to Red Cap Rettig, Mintz did not tell the red cap that the sample cases and their contents were valuable, notwithstanding Mintz' testimony that he did do so, nevertheless it is clear from Rettig's deposition that he knew that Mintz was a salesman; that the sample cases delivered to him by Mintz contained his salesman's samples; and that the same were valuable.

We submit, that even if knowledge by Rettig of the nature and value of the contents of the sample cases was of critical importance to the determination of the issue of defendant's liability upon the admitted facts in this case, (which we submit it is not) such knowledge is clearly admitted by Rettig, and such knowledge is as a matter of law imputed to defendant.

On this state of the record finding number 3 as made is clearly insufficient, and should be supplemented to include a finding that defendant, through its employee knew that the sample cases contained Mintz' samples and that the same were valuable.

III.

FINDING OF FACT NUMBER 5 IS INSUFFICIENT.

While finding number 5 in substance sets out the conversation between Rettig and the stranger shown by the

evidence, nevertheless it omits finding that Rettig was aware of his duties and obligations, and that his 410 subsequent breach thereof was his voluntary act, and that his voluntary act in removing the sample cases from his truck and placing them in the taxicab for the stranger was the sole cause of the loss, which he had the full power to prevent.

IV.

CERTAIN OF THE STATEMENTS CONTAINED IN FINDING OF FACT NUMBER 6 ARE CONTRARY TO THE UNDISPUTED EVIDENCE IN THE CASE, AND ARE THEREFORE CLEARLY ERRONEOUS.

We submit that the reference to "baggage checks" contained in finding number 6 is clearly erroneous for the reasons set forth in connection with finding number 2 above, and it should be amended to read "identification tags."

Further, the statement contained therein, to wit:

> ". . . the man claiming these bags put the suit case in the rear passenger space of the cab.",

is contrary to the undisputed evidence in the case. Rettig's statement, offered in evidence by defendant and received without objection, shows the following to be the correct statement of the fact:

> ". . . I put the black sample case with the wheels in the loading part of the cab next to the driver . . . I helped the man with the other bags, he saying he could put them into the rear with him."

The important difference between the statement contained in the finding and the actual fact as set forth in Rettig's statement is, that the latter shows conclusively that it was Rettig's voluntary act which caused the loss.

The last sentence in finding number 6 is also contrary to the undisputed evidence in the case.

41 The finding as made recites as follows:

"As the red cap opened the door leading into the train concourse from the cab stand to look for another red cap, he heard the taxi cab starting and saw it pull away."

The actual fact as related by Rettig in his statement made two days after the event is as follows:

"After putting the three bags in, he stayed there with the back door open and I hesitated there, waiting for another party. Then I started walking back into the station and as I turned around, I saw the cab pull away as I was just entering the door of the station". (See also admission number 5, which admits the fact to be as stated by Rettig and not as stated in the finding referred to.)

The difference between the fact as found and the actual fact is important for the reason that the latter clearly shows that Rettig voluntarily relinquished control of the sample cases which he not only had the power, but the duty, not to do.

V.

FINDING OF FACT NUMBER 7 IS CONTRARY TO THE FACTS ADMITTED BY DEFENDANT.

The use of the phrase "baggage checks" in this finding is also objectionable for the same reasons as stated in connection with findings 2 and 6 above.

Further, finding number 7 is more objectionable for what it omits than for what it contains.

It is true that the "identification tags":

". . . were not re-delivered to said red cap or to any other employee of defendant;"

However the finding omits the essential fact that Rettig voluntarily mis-delivered the sample cases to a stranger:

> ". . . without requiring the surrender of said stubs and without having received authority therefor from said Harry L. Mintz." (See defendant's admission number 5)

412

VI

FINDING OF FACT NUMBER 8 IS INSUFFICIENT IN THAT IT OMITS ESSENTIAL ADMITTED FACTS.

These admitted facts are set forth in defendant's admissions numbered 7, 8, 9, 11 and 12, and relate to plaintiff's authority to do business in Illinois; the existence and full force and effect of the policies upon which the payments set forth in finding number 8 were made; that said payments were made pursuant to claims upon said policies by the named assureds; and that plaintiff is the bona fide subrogee of said assureds.

VII

THERE IS NO EVIDENCE WHATEVER IN THE RECORD TO SUPPORT FINDING OF FACT NUMBER 9.

Admission number 1 states that defendant, an Illinois corporation, owned, controlled and operated the premises known as the Union Station. No competent evidence was offered to show that defendant's ownership of the premises was as a nominee for the railroads named in finding number 9; nor that its control and operation thereof was as agent, subject to the authority granted it by said railroads. Mr. Carlson, the Station Master, admitted, on cross-examination, that he was unfamiliar with any of

the corporate powers of the defendant; that he was neither an officer nor director of defendant; that he neither had seen nor had any knowledge of the existence of any agency contracts or other documents referring to any agency; that his function was as an employee of defendant, solely, to whom he was responsible and by whom he was paid.

Defendant's emphasis on this non existent agency is for the obvious purpose of attempting to clothe defend-
413 dant with the attributes of a "carrier" as it is defined in the law, so as to create the impression that the special body of the law relating to "carriers" is applicable to its operations, which it clearly is not.

Further, insofar as defendant here is concerned, there is not a shred of evidence in the record to support the findings that:

> "The defendant . . ., did not hold . . . out or undertake to provide red caps to carry currency or jewelry or articles of very great value. They did hold themselves out and undertake to transport such things as are ordinarily carried by travellers, such as clothes, shoes and other wearing apparel necessary for the traveller's comfort and convenience on a journey, consistent with the traveller's station in society."

The foregoing may be the law applicable to carriers, but it is not the law applicable to defendant as a bailee for hire to handle various kinds of bags containing personal property as it admitted.

Whatever railroads, as carriers, may or may not hold themselves out to undertake or do has no bearing on the liability of defendant in this case. No evidence whatever was offered by defendant even tending to show that its services, through its red caps were limited to handling special kinds of property only; or that there were any restrictions or limitations on the value of property con-

tained in receptacles which could be received by its red caps in the performance of their duties.

Admission number 2 made by defendant states that it:

> " . . . employed so-called 'red caps', whose duties were to receive bags of various kinds from the travelling public containing personal property.

414 No limitation or restriction on the nature, type or value of property which red caps could receive is referred to in this admission; nor is there any evidence whatever in the record that notice of any such restriction or limitation was brought to the attention of Mintz.

Moreover, whatever defendant held itself out to do or not to do in the circumstances was a matter of affirmative defense, as it perceived in paragraph 10 of its answer filed herein; and in respect of which defendant had the burden of proof. Not only did defendant fail to sustain this burden, but it made no effort to offer any evidence of such facts. Hence, insofar as finding number 9 relates to what defendant did or did not undertake to do, it is clearly gratuitous and not supported by anything contained in the evidence.

VIII

FINDING OF FACT NUMBER 10 IS INSUFFICIENT IN PART AND ERRONEOUS IN PART.

While finding number 10 does contain a finding that the relation between Mintz and defendant was that of bailor and bailee (rather than carrier and passenger) it nevertheless omits the important fact that defendant by its own admission was a bailee for hire. (See defendant's admission number 2)

The concluding sentence of finding 10 is clearly erroneous. Plaintiff dealt with the cases therein referred to (to-wit: Michigan Central Railroad Company v. Carrow,

73 Ill. 343; and Humphreys v. Perry, 148 U.S. 627, 37 L. ed. 587,) only after the same were cited by defendant's counsel in support of his position, and then only for the purpose of showing their inapplicability to the facts in the case at bar.

415 Moreover, while it is agreed that the law of Illinois governed the transaction, nevertheless the Illinois law announced in the two cases above referred to, as applied to the facts in those cases, is not controlling upon the facts in the case at bar.

These cases concern themselves solely with "baggage", (as the same is specifically defined in the law relating to "carriers") delivered to a railroad by a passenger holding a railroad ticket for free transportation in a baggage car pursuant to the specific limitations and restrictions contained in the written contract of carriage as set forth in the railroad ticket purchased by the passenger, and pursuant to tariffs filed by the carrier under the Interstate Commerce Act.

Defendant is not a carrier. Admittedly, it was an ordinary bailee for hire, hence it can neither claim the privileges and immunities of a carrier, nor is it saddled with the obligations of a carrier.

The special contract between a carrier and passenger is construed in the Carrow case above referred to, as follows: (See page 355)

> "The contract with him was simply to carry him as a passenger, and his personal lugage. It was not bound to carry anything he might choose to bring with him. . ."

This limitation applies only between carrier and passenger. No such limitation applies to the relation between an ordinary bailor and bailee for hire, in the absence of special contract or understanding between the parties.

No evidence of any contract or understanding relating to any limitation or restriction as to the type, nature or value of the contents of any receptacle, which defend-
416 dant, through it red caps, would receive in the performance of its contractual duties as a bailee for hire, was offered by defendant.

On the other hand, defendant admitted that the duties of its red caps, were to:

> " . . . receive bags of various kinds from the travelling public containing personal property, . . ."
>
> (See admission number 2 in evidence)

The import of this admission is that defendant, in the performance of its contractual obligations as a bailee for hire, undertook to receive from and redeliver to its customers, any and all kinds of receptacles containing any and all kinds of "personal property", without restriction or limitation.

Defendant, at paragraph 10 of its answer, as an affirmative defense to plaintiff's claim, sought, after the fact, to impose limitations upon the transaction in question. It there alleged that:

> " . . . had it or its agents been informed of the contents of said three pieces of baggage, it would have refused to accept them and would have advised said Harry Mintz to make other arrangements for their handling and custody."

Notwithstanding that what defendant would or would not have done is a mere matter of conjecture on its part, defendant nevertheless had the burden of proving this affirmative defense, yet not a shred of evidence was offered in support thereof.

From a consideration of the pleadings, admissions and evidence in the case at bar discussed above, it is clear that the cases relied on by defendant and cited in finding

number 10, do not support the conclusions of law set forth thereafter.

417

IX

CONCLUSION OF LAW NUMBER 1, INSOFAR AS IT HOLDS THAT THE JEWELRY CONTAINED IN THE SAMPLE CASES OF HARRY L. MINTZ WAS NOT PART OF HIS BAGGAGE AS A TRAVELER, IS IRRELEVANT TO THE REAL ISSUE IN THE CASE AT BAR.

As above shown, defendant was not a carrier, but was an ordinary bailee for hire, and having admittedly held itself out as undertaking to "receive bags of various kinds from the travelling public containing personal property", without limitation as to type, nature or value of the contents of such receptacles, it cannot and should not be permitted to exonerate itself from the consequences of its wrongful act, not only in failing to keep safely the property of its customers entrusted to it for temporary safekeeping and redelivery, but in voluntarily misdelivering the same, which was the direct and sole cause of the loss sustained by plaintiff.

X

CONCLUSION OF LAW NUMBER 2 IS NOT ONLY IRRELEVANT AND ERRONEOUS, BUT IT IGNORES THE UNDISPUTED EVIDENCE.

The undisputed evidence is that defendant's employee, who received the sample cases into his custody from Mintz for temporary safekeeping and redelivery to him, knew that Mintz was a salesman, that the cases contained his samples and that the same were valuable.

Moreover, there is nothing in the law relating to bailees for hire which requires a bailor to specify to his bailee,

the nature, type and value of the contents of a receptacle obviously containing personal property, in order to create a bailment of the receptacle and its contents.

XI

CONCLUSION NUMBER 3 IS ERRONEOUS.

418 The conclusion preceding the first semi-colon in conclusion of law number 3, is erroneous, in that it applies the law relating to carrier and passenger to the ordinary relationship of bailor and bailee for hire.

There is nothing in the law relating to bailments which require a bailor, in the absence of special contract or understanding, or notice to the bailor of special limitations, to volunteer information as to the nature, type, and value of the contents of a receptacle delivered to a bailee for hire for temporary safekeeping and redelivery to the bailor, upon pain of being declared guilty of a constructive legal fraud.

The final conclusion that Harry L. Mintz was guilty of negligence contained in conclusion of law number 3, is clearly irrelevant and erroneous as a matter of law.

To hold that Mintz was so negligent as to preclude recovery for the loss sustained, can only be relevant if it can be demonstrated that this negligence proximately contributed to the loss of the sample cases.

It is obvious from the evidence that there was nothing in what Mintz did or omitted to do in delivering his sample cases, containing the jewelry sued for, to the red cap, which can even be remotely connected with defendant's employee's misdelivery of the sample cases in question.

Conclusion number 3 as made, carries with it the unavoidable implication that a bailor's failure to disclose

the nature, type and value of the contents of a receptacle to his bailee for hire, necessarily, and as a matter of law, immunizes the bailee from the consequences of his conversion of the bailor's property by misdelivery of same to one not authorized to receive it.

419 For the reasons stated above, the court should set aside the findings of fact and conclusions of law heretofore made and vacate the judgment heretofore entered pursuant thereto on June 18, 1957, and to find the facts and state the conclusions of law and direct the entry of judgment for plaintiff in accordance with the findings of fact and conclusions of law attached hereto and submitted herewith.

Respectfully submitted,
/s/ Cecil E. Magid
Of Weissenbach, Hartman, Craig & Okin
Attorney for Plaintiff.

420 UNITED STATES DISTRICT COURT

(Caption—No. 56 C 1438)

(Filed Jun 26 1957)

Findings Of Fact And Conclusions Of Law filed June 26, 1957 as follows:

This action having been tried by the Court, without a jury, upon the admissions of defendant made in response to plaintiff's request for admissions of fact, and upon the oral testimony and deposition of witnesses, and the Court, having heard the arguments of counsel, and being fully advised in the premises, finds the facts and states the conclusions of law, as follows:

FINDINGS OF FACT

1. That defendant is an Illinois corporation, and at all times here involved, solely owned, controlled and operated

certain premises in the City of Chicago, Illinois, commonly known as "The Union Station".

2. That on September 11, 1955, defendant employed certain persons, designated by it as "red caps", among whom was one, Raymond C. Rettig, identified by defendant as Red Cap No. 71, whose duties were to receive for temporary safekeeping, various kinds of bags containing personal property, and to redeliver the same to the persons from whom the same were received, as directed by such persons, for which services defendant exacted a
421 charge of 25¢ for each item so received by each red cap.

3. That on September 11, 1955, Red Cap No. 71, received from one, Harry L. Mintz, two sample cases, one with wheels attached to its bottom, and a brown two-suiter bag; which sample cases and bag were to be redelivered by the redcap to Mintz aboard a certain train, scheduled to depart from said station a short time thereafter, for which services Mintz paid Red Cap No. 71, the required consideration of 75¢ plus a gratuity of 25¢.

4. That Red Cap No. 71 knew that Mintz was a salesman; knew that his sample cases contained his salesman's samples; and knew that the samples were valuable to Mintz.

5. That at the time of the delivery of the sample cases and bag by Mintz to Red Cap No. 71, the red cap attached identification tags bearing numbers 792319, 792320 and 792321 to each of said bags respectively, and delivered to Mintz, stubs torn therefrom bearing identical numbers. That these identification tags, in addition to the numbers printed thereon, bear the following legend:

CHICAGE UNION STATION COMPANY	
in case of loss notify Station Master or train conductor at once.	RED CAP NO.
TARIFF	71
CHARGE 25¢	
G 792319	

6. That it was the duty of the red cap to require the surrender of the identification tag stubs before redelivering the parcels received by him in order to assure that redelivery was made to the proper person.

7. That on September 11, 1955, without requiring the surrender of the identification tag stubs, (at the re-
422 quest of a stranger whom Red Cap No. 71 knew not to be Mintz, and whom he knew did not have possession of identification tag stubs,) Red Cap No. 71 nevertheless removed Mintz' sample cases and brown two-suiter bag from the truck upon which the red cap had placed them, and delivered them into the possession and control of a stranger, by carrying them from the concourse of the station to a taxicab stand on the outside thereof, and placed one of the sample cases in front with the driver of the cab and helped the stranger place the remaining sample case and brown-two-suiter bag in the passenger compartment of said taxicab; that after hesitating for a few seconds, Red Cap No. 71 re-entered the station leaving the stranger in possession and control of Mintz' sample cases and brown two-suiter bag and their contents, at which point the cab drove away; that the said sample cases and their contents, for the loss of which this action was brought, were never recovered from the stranger and were never thereafter redelivered to Mintz.

8. That on the date herein involved, Harry L. Mintz was engaged in business in Chicago, Illinois, as a whole-

sale jeweler in his own behalf, and, in addition, was employed as a salesman by Ostrow and Samit, and Samuel Abramson, manufacturing jewelers, having their principal places of business in New York City; that on said date, Mintz had in his possession, in addition to his stock in trade, the jewelry samples delivered to him by Ostrow & Samit and Samuel Abrahamson, and that a portion of his own stock in trade, as well as the samples belonging to his said employers were placed by him and were contained in the sample cases delivered to Red Cap No. 71.

9. That plaintiff, a Minnesota corporation is an 423 insurance company, duly authorized to do business in Illinois; that on the 11th day of September, 1955, there were in existence and in full force and effect, the following numbered insurance policies theretofore issued by plaintiff to Ostrow & Samit, Samuel Abramson and Harry L. Mintz, bearing numbers JB05-8299, JB05-8034 and JB05-7458, respectively, which policies insured the said assureds against loss of their respective stocks in trade consisting of items of gold, platinum, jewelry, rings, watches, diamonds and other precious and semi-precious gems; that plaintiff, pursuant to claims made against it, under said policies by said Ostrow & Samit, Samuel Abramson and Harry L. Mintz, for the loss of the merchandise contained in the sample cases delivered by Mintz to Red Cap No. 71, plaintiff paid to each of its said assureds the amounts set opposite their respective names, to-wit:

Ostrow & Samit	$10,884.67
Samuel Abramson	17,196.00
Harry L. Mintz	6,525.21
Aggregating	$34,605.88;

that by reason of said payments so made by plaintiff to its said assureds, plaintiff became and is the actual and

bona fide subrogee of its said assureds for the amount of $34,605.88; that according to the testimony of Mintz, the value of the jewelry owned by Ostrow & Samit, Samuel Abramson and himself, contained in the sample cases delivered by him to Red Cap No. 71 aggregated $34,605.88.

10. No evidence was offered by defendant of any restriction or limitation with respect to the nature, type or value of the bags or cases or the contents thereof, which defendant permitted its red caps to handle, and no notice of any such restriction or limitation was in any manner brought to the attention of Mintz.

424 11. That defendant makes no claim of limitation of its liability for the loss of receptacles and their contents delivered to its red caps by reason of any tariffs filed in compliance with any requirements of the Interstate Commerce Act, and that none was filed pursuant thereto.

CONCLUSIONS OF LAW

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT STATES THE FOLLOWING CONCLUSIONS OF LAW:

1. That the relationship created between Mintz and defendant by reason of the delivery of the sample cases in question to defendant's employee, Red Cap No. 71, for temporary safekeeping and redelivery to Mintz, for which Mintz paid the consideration demanded by defendant therefor, was that of bailor and bailee for hire.

2. That defendant's admission that it offered the services of its red caps, for the stated consideration, for the purpose of receiving bags of various kinds, containing personal property, without notice to the public of any restriction as to type, nature or value of the contents

contained therein, constituted defendant a bailee for hire of the contents of the sample cases delivered by Mintz to Red Cap No. 71.

3. That the act of defendant's Red Cap No. 71 in delivering Mintz' sample cases and their contents to an unauthorized person without requiring the surrender of the identification tag stubs constituted a misdelivery thereof and was, in legal effect, a conversion of the sample cases and their contents to the same extent as if the same were appropriated by defendant to its own use, making defendant liable for the value thereof, irrespective of negligence, and Red Cap No. 71's good faith in
425 making such misdelivery is immaterial.

4. That the act of Red Cap No. 71 in misdelivering Mintz' sample cases and their contents as aforesaid, was the sole, direct, and proximate cause of the loss of said sample cases and their contents.

5. That whether defendant, through its red cap, would or would not have accepted Mintz' sample cases for handling had he been apprised of the nature and value of their contents, is immaterial in view of defendant's conversion of the sample cases by the misdelivery thereof. Moreover, the testimony of Red Cap No. 71, in his deposition, read in evidence, shows that he knew Mintz was a salesman, that his sample cases contained his salesman's samples, and that they were valuable to him.

Accordingly, there will be a finding for the plaintiff and a judgment in favor of plaintiff for the amount admittedly paid by it to its assureds, to-wit: $34,605.88.

Date at Chicago, Illinois, June ....., 1957.

Enter:

.....

Judge.

426

UNITED STATES DISTRICT COURT

(Caption—No. 56 C 1438)

MOTION OF PLAINTIFF FOR NEW TRIAL.

Filed June 26, 1957, as follows:

Plaintiff moves the Court to set aside the findings of fact and conclusions of law and the judgment entered herein on the 18th day of June, 1957, and to grant plaintiff a new trial on the grounds that:

1. The court erred in ruling that:

(a) The jewelry contained in the sample cases of Harry L. Mintz, delivered to defendant's employee, Red Cap No. 71, was not part of his personal property as a traveler;

(b) That no bailment relation was created by the delivery of the sample cases and their contents to said red cap;

(c) That Harry D. Mintz perpetrated a constructive legal fraud upon defendant;

(d) That Harry L. Mintz was guilty of negligence, as a matter of law, which contributed to the loss of the sample cases.

2. The judgment is contrary to law in that:

427 (a) It disregards the undisputed evidence that defendant is not a carrier either in fact, or in legal contemplation, but nevertheless applies the law applicable to carriers to the admitted facts, rather than that applicable to ordinary bailees for hire, as is evident from the conclusions of law made by the Court.

(b) It concludes that the creation of an ordinary bailment for hire is, as a matter of law, dependent upon the bailor informing the bailee of the specific nature and value of the contents contained in a receptacle, accepted

by a bailee for temporary safekeeping and redelivery to his bailor intact at an agreed time and place, without notice of any such requirement or restriction or limitation to the bailor.

(c) It disregards the knowledge of the bailee, as shown by the undisputed testimony of the red cap himself, that the bailor was a "salesman"; that the receptacles delivered to the bailee were "sample cases"; that the same contained "salesman's samples", and that the same were valuable.

(d) It permits defendant to profit from the breach of its contract with Mintz under which (for a consideration in money required by defendant to be paid, and which admittedly was paid by Mintz), defendant undertook to keep safely the sample cases and their contents until redelivered to him; and disregards the active misdelivery amounting in law to a conversion of the sample cases by defendant's employee, as shown by the undisputed evidence.

3. The findings of fact are contrary to the evidence.
4. The judgment is contrary to law.

Respectfully submitted:

.....

428-437 * * *

438 United States of America
Northern District of Illinois
Eastern Division

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 1438) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, Chief Judge of said Court, in his court

room in the United States Court House at Chicago, Illinois, on Wednesday, September 11, 1957, at 2:00 o'clock p.m.

Appearances:

Cecil E. Magid, Esq.,
Of Weissenbach, Hartman, Craig & Okin
(Suite 1630, 7 South Dearborn St.,
Chicago 3, Ill.),
on behalf of Plaintiff;

Erwin W. Roemer, Esq.,
Of Gardner, Carton, Douglas, Roemer & Chilgren
(Suite 1430, 33 S. Clark St., Chicago 3, Ill.),
on behalf of Defendant.

439-440 * * *

441 * * * * *

By the Court: Well, I can't really understand how I happened to allow you to reargue this case; I can't understand that. We spent two and one-half days on it in June; we spent the afternoon of June 5th and all of June 6th, and my books show we spent the afternoon of June 7th in argument, and I have a list of cases cited to me such as I haven't had in any other place in this book.

I did the very best I could, and you gentlemen evidently did the very best you could, or what you thought the case deserved. I did the best I could on the evidence you presented and on the law you showed me on the 7th of June.

I have read these briefs. I read them last week, or early this week, I don't remember which. Nothing you have said to me in these briefs or have said to me today leads me to believe that anything I would do other than what I did back on June 7th would more nearly represent

justice. I think what I then said or stated my views to be with respect to the case was done as well as I could state them today. I haven't any reason to change my thoughts.

The motion for a new trial is overruled and de-
442 nied.

Motions to strike the findings of fact and conclusions of law and judgment order are denied.

443 * * *

444

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 56 C 1438) * *

Wednesday, September 11, 1957

Present: Honorable John P. Barnes, Chief District Judge

This cause coming on for hearing on plaintiff's motion to set aside findings of fact, conclusions of law and judgment order and to make findings and conclusions as submitted by plaintiff and motion of plaintiff for a new trial come the parties by their counsel and the Court having heard arguments of counsel on said motions and being fully advised it is

Ordered that motion of plaintiff to set aside the findings of fact, conclusions of law and judgment entered on June 18, 1957 and that the Court make findings of fact, conclusions of law and enter judgment order in favor of plaintiff as submitted by plaintiff be and the same hereby is denied and it is

Further Ordered that motion of plaintiff for a new trial be and the same hereby is denied.

445

UNITED STATES DISTRICT COURT

(Caption—No. 56 C 1438)

NOTICE OF APPEAL
(Filed Sep 26 1957)

Notice is hereby given that Saint Paul Fire and Marine Insurance Company, a Minnesota corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit, from the final judgment entered in this action on June 18, 1957, that there be a finding and judgment in favor of defendant, Chicago Union Station Company, an Illinois corporation, and that the cause be dismissed at plaintiff's costs, and from the order entered on September 11, 1957, denying the motions of plaintiff to set aside the findings of fact, conclusions of law and judgment order entered on June 18, 1957, and that the court make findings of fact and conclusions of law and enter judgment in favor of plaintiff as submitted by plaintiff, and in the alternative for a new trial.

.....

Cecil E. Magid, of the firm of
Weissenbach, Hartman, Craig & Okin
7 So. Dearborn Street, Chicago, Illinois
Attorneys for Plaintiff

Erwin W. Roemer,
P. J. Cronin
33 S. Clark Street
Chicago, Illinois
Attorneys for Defendant

446 United States of America }
Northern District of Illinois } ss:

• • (Caption—No. 56 C 1438) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on September 26, 1957, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Erwin W. Roemer and P. J. Cronin
33 South Clark Street
Chicago 3, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of September ....., 1957.

Roy H. Johnson
Clerk
By Gizella Butcher
Deputy Clerk

(Seal)

447-451 • • •

UNITED STATES DISTRICT COURT

(Caption—No. 56 C 1438)

STIPULATION
(Filed Oct 21 1957)

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the plaintiff-appellant in the above entitled cause be permitted to substitute as part of the record on appeal in said cause, a copy of the statements attached as exhibits to the depo-

sition of Raymond C. Rettig in lieu of the actual exhibit attached to said deposition, which said statements were admitted in evidence in this cause as unnumbered exhibits as shown at pages 266-267 of the transcript of the proceedings in this cause.

/s/ Cecil E. Magid
Attorneys for Plaintiff-Appellant
/s/ Erwin W. Roemer
Attorneys for Defendant-Appellee

September 13th, 1955

ATTENTION SUPERINTENDENT:

Please see that every driver reads the enclosed bulletin.

R. E. Stouffer

SPECIAL BULLETIN
(Filed Oct 21 1957)

Will the driver who picked-up a load in the North Cab Court of the Union Depot Sunday afternoon, between 4:25 and 4:45 P.M., wherein a black fiber sample case on wheels was placed in the drivers compartment and a smaller black fiber case and traveling bag was placed in the rear with the passenger, get in touch with me at once, as it is extremely important.

R. E. Stouffer
9/13/55

RES:gl

Chicago, Ill., September 13, 1955.

Statement submitted by H. L. Mintz in connection with loss of three bags on Sunday, September 11, 1955.

My name is Harry L. Mintz, Manufacturers' Representative, office address 29 E. Madison St., Room 1515, Chicago, office FRanklin 2-8807, home address 6302 N.

Sacramento Ave., Chicago, Ill., telephone Rogers Park 1-1938 and represent:

S. & D. Jewelry Manufacturing Co.,
106 Fulton Street
New York City, N. Y.

Samuel Abramson,
11 Johns Street
New York City, N. Y.

Ostrow & Sanit
102 Fulton Street
New York City, N. Y.

K. & S. Jewelry Co.,
83 Canal Street
New York City, N. Y.
Carries merchandise for self.

I had brought my suitcase from home to my office on Saturday. I arrived at my office on Sunday about 3:45 P.M., Daylight Savings Time, was there about fifteen minute , then waited for a cab for about fifteen minutes. I arrived at the station where bags were unloaded; there were no redcaps so I brought the bags into the station alongside the baggage where the tracks are and got this redcap. He was checking in baggage for parlor car 231. The redcap took the three bags I had and I told him to be careful in loading them so they wouldn't roll off his truck. This must have been around 4:20 or 4:25 P.M. Then he put the checks on my bags and gave me the tickets for them—presenting Redcap 71 checks 792319, 792320 and 792321—then I made a telephone call to the house and usually, in order to avoid the crowd, I walk through and wait outside for the train and waited out in the trainshed concourse for the train. This was even

before the train came in and I went out on the platform where there were several other people.

Then I noticed a redcap, I don't know whether it was my redcap or not—it looked like mine—and looked for my bags on his truck but didn't see them so I said to him: "Are you 71" and he didn't answer me, maybe he didn't hear me as he was busy checking numbers on the cars; I don't know if it was 71 or not. Then the train came in and I got on the train before the crowd.

Just as the train pulled out I asked for my bags and described them and the porter looked in the compartment and said no and said he would look through the train; he asked me to give him the checks, which I did and he looked through the train and said he couldn't find them. Then I said I would look through the train, which I did and didn't see them. Then he said he had better send a wire and would try to get it off at Aurora; I don't think he made it at Aurora—went in at Oregon or some place. Then I reached Minneapolis and made a report and the Station Master said that the redcap told him that all the baggage he had was put on the train.

Mr. Carlson to Mr. Mintz:

Q. Were you accompanied by anyone when you left the office?

A. No—it was deserted, the Street was deserted.

Q. And you came in a cab by yourself?

A. Yes.

Q. Was a cab in back of you?

A. No.

Q. Did you see anyone milling around your bags?

A. There was a big fellow there talking to the red cap and these two fellows that were checking in—they were on the train and I recognized them. They had a lot of baggage.

Q. Have you a brother?

A. I have a brother in New York.

Q. Have you a brother here in Chicago?

A. No.

Q. In your statement you have not described the baggage and contents of the baggage—I wonder if you would do so.

A. The sample case is a two-sectional sample case; the bottom section has three wheels and the top section fits into the top of it, but when they are checked through they are checked as two separate bags. They had combination locks. There are no other cases like it—I had it made special. The bottom tray contained.

20 trays of rings, 14 with 14 carat gents mountings, one of which has small diamonds on the side, no big stuff;

1 tray Linde Star Sapphires;

1 tray of ladies fancy rings—set with small diamonds. "Milling" they are called.

1 tray of eight rings with some pearls;

4 trays of ladies fancy mountings, 2 trays of which were sapphires; 2 trays contained a fibre box containing unset watch cases of platinum and gold;

2 trays earring mountings, 14 carat;

1 tray Crosses and Stars of David, 14 carat;

7 trays platinum mountings, 5 of which were semi-mounted;

2 trays of diamond watches with Hamilton movements —we have movement numbers.

The items are valued at about $35,000.00, although it may be more as I do not keep track of this too closely. The items belonging to me are insured by the St. Paul Marine & Fire Insurance Company, or some similar name. Items of property of the firms which I represent, I be-

lieve are insured, with the possible exception of K. & S. Jewelry Company, as they are small and may not be insured. The valuation given is based on wholesale values.

I came back to Chicago Monday night and spoke to someone in the office in the trainshed concourse, but do not recall his name, making report to him advising I would come back to the Stationmaster's office Tuesday.

This is the first loss I have had of this kind. No report has been made to the police as yet as I didn't think it would be a case of loss, believing it was a case of misdirection.

The Samsonite bag which is missing has a name tag with my name and address on it.

At this point, Red Cap R. C. Rettig was brought in and upon being asked to identify him, Mr. Mintz replied it seemed to be the red cap who had served him, although he appeared much different in civilian clothes than while dressed as a red cap. Red Cap Rettig admitted that Mr. Mintz was the man who had originally given him the three bags in question. Mr. Rettig related the facts of the case as follows:

On Sunday, we had only nine red caps and the train in question, CB&Q 23; is usually loaded by Red Cap Heenan. I was assigned to Milwaukee #6 and had come back from that train and delivered baggage therefrom. Chief Usher L. V. Barton then asked me to load CB&Q #23, as Heenan was not there, and, as I had loaded the train before, I arranged to do as requested. I took my truck over to the entrance way to the north side cab court and parked my truck there and proceeded to load baggage. At that time, people were there waiting. I had parked my truck in the doorway of the north side cab court opposite end of the lockers. One man was standing there with 8 pieces for Car P-23. This gentleman—indicating Mr. Mintz—

asked me to handle his bags and I asked him to wait as I was busy. I put the checks on the eight bags and then came back to Mr. Mintz to take care of him. I got three bags from Mr. Mintz—two sample cases, one with wheels and a brown two-suiter bag—after getting the bags from Mr. Mintz, I left them on the floor as I had eight pieces; as I load the bags on my truck in a certain way to speed delivery on the train, I leave them all on the floor until I have all my loads, then proceed to place them on my truck in this certain manner. Red Cap P. Maguire called to me there was another party going on the 4:00 o'clock Zephyr and I said I didn't think I could handle them, then I believe there was another lady for car going to St. Paul. Then I ran out in the cab court and picked up a seven piece load going to LaCrosse, the fellow telling me he was moving and I pulled my truck out in the cab court, during which time, Mr. Mintz's bags were still on the floor in the station, and then there were some more people going to St. Paul.

Then a young gentleman came up and said, in effect, they weren't going to St. Paul, he guessed they were going to drive up. By this time, Mr. Mintz's baggage had been loaded on my truck by myself—they were "winged" on the bottom with Car P-23 eight-piece load on the top. The man said to me he wasn't going to make the train and said he wanted the bags. I asked him if he had the checks and he said his brother had them and was making a telephone call. I told him I would be there ten minutes and asked him if he would come back. I proceeded to load my bags on my truck for Train 23 and in about three or four minutes this young gentleman came back and said: "We're all ready" and wanted these three bags, pointing them out. I remember remarking to some man about having to tear my load apart. I took the bags off for Car P-23

from the rear of my truck and pulled these three bags out. Then the man said, "Will you take me to a cab", and I think I remarked I didn't have time, or something like that, then said I would take him out to the north side there; there was a Yellow Cab pulling in the line. So I picked up the three bags and carried them out to the cab court and asked the cab driver if he wanted to pick up a load there and he said "Yes," so I put the black sample case with wheels in the loading part of the cab next to the driver; the other two bags were still on the sidewalk and I helped the man with the other bags, he saying he could put them into the rear with him. After putting the three bags in, he stayed there with the back door open and I hesitated there, waiting for another party. Then I started walking back into the station and as I turned around, I saw the cab pull away as I was just at the door entering the station.

The bags were put in the cab between 3:25 and 3:40 P.M., Central Standard Time.

There were two black sample cases made of fibre board, one of which had wheels; the bottom section (with wheels) had straps, the top section had a hard handle. The other was a brown two-suiter bag.

Description of thief;

About 25 years of age

5 feet nine inches, 155 pounds

Light brown hair, neatly parted, nice looking, well-dressed, nice manner

No hat, light brown worsted sharkskin suit.

E. A. Anderson, Room 200, 330 S. Wells Street, Wabash 2-2035

W. J. Spillard, 222 W. Adams St., Randolph 6-0044

Sgt. Kush

Rettig, 5902 W. 28th St., Cicero, Ill. Phone Olympic 2-1693

PLAINTIFF'S EXHIBIT 6
(Filed Oct 21 1957)

CHICAGO UNION STATION COMPANY
in case of loss notify Station Master or train conductor at once. RED CAP No.
Tariff Charge 25¢
G 792321 [ ]

PLAINTIFF'S EXHIBIT 7

CHICAGO UNION STATION COMPANY
in case of loss notify Station Master or train conductor at once. RED CAP No.
Tariff Charge 25¢
G 792320 [ ]

PLAINTIFF'S EXHIBIT 8

CHICAGO UNION STATION COMPANY
in case of loss notify Station Master or train conductor at once. RED CAP No.
Tariff Charge 25¢
G 792319 [ ]

PLAINTIFF'S EXHIBIT 9
(Filed Oct 21 1957)

STATEMENT OF LOSS

HARRY L. MINTZ — LOSS

1. 14K Yellow Gold bracelet Watch 17 J Swiss (Braided design) $150.00
2. 14K Yellow Gold bracelet Watch 17J Hamilton (Slide design) 100.00
3. 14K Yellow gold bracelet Watch Glycine (Coin design) 85.00

4. #2704 14K White Gold Watch with half round block attachment, Swiss 6 lignmovement - 38 Dias. - .72 cts. 188.84
5. #3301 14K White gold Watch with half round block attachment, 17J Hamilton - 8 Dias. - .28 cts. Movement #737541A 113.76
6. #1404 14K White Gold Watch 17J Hamilton - 8 dias. - .28 cts. Movement #912140 88.76
7. #1404 14K White Gold Watch 17J Hamilton 8 dias. - .28 cts. Movement #806048 88.76
8. #1666 14K White Gold Watch 17J Hamilton 34 round and 6 Bag. dias. - .86 cts. Movement #820360 196.54
9. #1672 14K White Gold Watch 17J Hamilton 30 Dias. - .74 cts. 175.66
10. #1770 14K White Gold Watch 17J Hamilton 38 Dias. - .88 cts. Movement #815579 197.67
11. #1644 14 K White Gold Watch 19J Hamilton 30 Dias. - .47 cts. 134.85
12. #1775 14K White Gold Watch 17 J Hamilton 32 Dias. - .83 cts. 183.75
13. #2701 14 K White Gold Watch 6 Ligne Swiss 26 Dias. - .32 cts. 92.00
14. #1406 14K White Gold Watch 17J Hamilton 10 Dias. - .26 Cts. Movement #905261 89.90
15. #1725 14K White Gold 17J Hamilton - 40 Round and 6 Bag. 1.08 cts. Movement #887860 245.28
16. #1402 14K White Gold 17 J Hamilton - 10 Dias. - .35 cts/ Movement #754087 100.20
17. #1778 14K White Gold 17J Hamilton - 22 - .50 cts. Move. #819663A 122.18
18. #1339 14K White Gold 17J Hamilton - 28 - .45 cts. Move. #75341A 132.80

19. #2105 14K White Gold 17J Hamilton - 36 .76 Cts. Move. #787974A 165.00
20. #1619 14K White Gold 17J Hamilton - 38 .70 Cts. Move. #887960 175.16
21. #6808 14K White Gold 17J Hamilton - 20 .29 Cts. 100.37
22. #3501 14K White Gold 17 J Hamilton - 12 Dias. - .18 Cts. 77.70
23. #1328 14K White Gold 17J Hamilton - 30 Dias. - .47 Cts. 134.50
24. #606 14K White Gold Mesh Bracelet Watch 17J Hamilton, 8 dias. - .45 Cts. 167.30
25. #1883 Platinum 17J Hamilton Watch - 22 Dias. - .57 Cts. 186.15
26. #2110 Platinum 17J Hamilton Watch - 46 Round and 6 Bag. - 1.64 Cts. 424.15
27. #1728 Platinum 17J Hamilton Watch - 36 Dias. - 1.31 Cts. 336.95
28. #1752 Platinum 17J Hamilton Watch - 30 Round and 6 Bag. - 1.46 Cts. 350.55
29. #1723 Platinum 17J Hamilton Watch - 48 Round and 12 Bag. - 1.93 Cts. 468.00
30. #1746 Platinum 17J Hamilton Watch - 38 Dias. - .94 Cts. 285.20
1. 14K Gent's Linde Star Ring 8.25 Cts. 2 Dias. 80.00
2. 14K Gent's Linde Star Ring 11.25 Cts. 95.00
3. 14K Gent's Genuine Star Sapphire Ring 9.69 Cts. 75.00
4. 14K Gent's Genuine Star Sapphire Ring, 6 Cts. 200.00
5. 14K Gent's Genuine Star Sapphire Ring. 12 Cts. 175.00
6. 14K Gent's Genuine Star Sapphire Ring with one Baguette 75.00
7. 14K Ladies' Genuine Star Ruby - White Gold Mtg. Star - 3 Cts. and 2 Dias. 75.00

8.	14K Twin Pearl Ring with 2 Dias.	20.00
9.	14K Ladies' Diamond Pearl Ring	80.00
10.	14K Ladies' Diamond Pearl Ring	80.00
11.	14K Ladies' Cultured Pearl Diamond Ring	48.00
12.	14K Ladies' Cultured Pearl Ring - 7½MM	15.00
13.	14K Ladies' Cultured Pearl Diamond Ring	56.14
14.	14K Ladies' Diamond Pearl Ring Yellow Gold	80.00
15.	14K Ladies' Diamond Pearl Ring . ." "	80.00

DEFENDANT'S EXHIBIT 1
(Filed Oct 21 1957)

My name is Harry L. Mintz and I reside at 6302 North Sacramento, Chicago 45, Illinois. I have lived in Chicago since 1943. Before that I lived in New York City, New York. I am married and live with my wife Rosalie and my son Kenneth, age 10 years, and my mother-in-law, Bertha Weiss. I have been a manufacturers representative since 1946. I am a jeweler jobber as well. I travel the middlewest, south and some cities in the east. I have never had a loss before.

I came to the office, Sunday, September 11th about 3:45 P.M. and left the office about 4:00 P.M. to 4:05 P.M. I waited and took a yellow cab to north loading platform of the Union Station at 4:15 P.M. I unloaded and brought bags into the station. I had 2 carrying sample cases and personal bag. I turned the bags over to a red cap #71 who was loading 5:00 P.M. Burlington to the Twin Cities. I then made a phone call home. I then went to train shed, waited 15 minutes, the train arrived about 4:55 P.M. I boarded Minneapolis Coach and as train started to move, Porter John W. Cook, looked for my bags and couldn't find them. I gave him the stubs and he looked again and they weren't on the train. I then searched the train. A wire was sent from La Crosse to Chicago. When I reached

Minneapolis I went to Station Master. Baggage room and train was searched again by the Station Master, Becker.

I stayed at the Radison Hotel at Minneapolis, spoke to Station Master Davis. The next morning, Monday 12th I checked again and no word. I took 3:30 Northwest flight and took limousene to Hilton. I then took a cab to the station and discussed the matter with assistant station master who helped red cap #71 load the train, Tuesday morning I discussed it with station master who advised me the bags were claimed by a person who claimed to be my brother. They brought the red cap #71 who told his story. The bags were loaded on north end of station for unloading only into a yellow cab. The red cap feels he could identify the person.

I went to Police Headquarters and filed my charges. The police detectives Clark and Daley are investigating. I notified my broker and the New York manufacturers whom I represent. I have the claim stubs No. G792319 (71), G 792320 (71), and G 792321 (71), Chicago Union Station Company. I lost most of my records which was in my personal bag. I represent:

1. S & D Jewelry Manufacturing Company, Inc., 106 Fulton Street, New York City. That is platinum and gold watch cases.
2. Samuel Abramson, 11 John Street, New York City. Consists of 15 trays of men's mountings, 2 trays ladies sapphire fancy rings, 2 trays mixed sapphire and plain rings, 1 tray 12 rings, 4 pearl, sapphires unknown, 1 tray ladies and gentlemen's Lindy stone sapphire, 1 tray 11 genuine gentlemen's star sapphire, 1 tray mounted fancy ladies rings. Approximately 30 rings to tray for gentlemen's and 36 ladies.

3. Ostrow & Semit, 102 Fulton Street, New York City. Their line is semi-mounted platinum mountings and platinum body rings.
4. K & S, 83 Canal Street, New York City. Earrings, gold crosses and Star of David.
5. Harry Muntz, 29 East Madison, Chicago. A tray containing rings, 2 trays of diamond watches. The actual records are being marked up from books and records at present time.

The above is a true and correct statement to the best of my ability. I have read all four pages of the statement, signed all pages and initialed all errors.

/s/ Harry L. Mintz.

My total inventory June 27th was at cost $21,844.92. My inventory at the time of loss was about the same.

EXHIBIT A

14 K yellow gold bracelet watch 17 jewel Swiss (Briaded design).	$ 150.00
14 K yellow gold bracelet watch 17 jewel Hamilton (Slide design)	100.00
14 K yellow gold bracelet watch Glycine (Coin design)	85.00
#2704 - 14 K white gold watch with half round block attachment, Swiss 6 lign movement - 38 diamonds .72 carats	188.84
#3301 - 14 K white gold watch with half round block attachment, 17 jewel Hamilton, 8 diamonds .28 carats, Movement #737541A	113.76
#1404 14 K white gold watch 17 jewel Hamilton, 8 diamonds .28 carats, movement #912140	88.76
#1666 14 K white gold watch 17 jewel Hamilton, 34 round and 6 baguette diamonds, .86 carats, movement #820360	196.54

#1672 - 14 K white gold watch 17 jewel Hamilton, 39 diamonds .74 cts.	175.66
#1770 - 14 K white gold watch 17 jewel Hamilton, 38 diamonds .88 cts. Movement #815579	197.67
#1644 - 14 K white gold watch 19 jewel Hamilton, 30 diamonds .47 cts.	134.85
#1775 - 14 K white gold watch 17 jewel Hamilton, 32 diamonds .83 cts.	183.75
#2701 - 14 K white gold watch 6 Ligne Swiss, 26 diamonds .32 cts.	92.00
#1406 - 14 K white gold watch 17 jewel Hamilton, 10 diamonds, .26 carats, Movement #905261	89.90
#1725 - 14 K white gold 17 jewel Hamilton, 40 round and 6 baguette, 1.08 carats, Movement #887860	245.28
#1402 - 14 K white gold 17 jewel Hamilton, 10 diamonds .35 carats, Movement #754087	100.20
#1778 - 14 K white gold 17 jewel Hamilton, 22, .50 carats, Movement #819663A	122.18
#1339 - 14 white gold 17 jewel Hamilton, 28, .45 carats, Movement #75341A	132.80
#2105 - 14 K white gold 17 jewel Hamilton, 26, .76 carats, Movement #787974A	165.00
#1619 - 14 K white gold 17 Jewel Hamilton, 38, .70 carats, Movement #887960	175.16
#6808 - 14 K white gold 17 Jewel Hamilton, 20, .29 carats	100.37
#3501 - 14 K white gold 17 Jewel Hamilton, 12 diamonds, .18 carats	77.70
#1328 - 14 K white gold 17 Jewel Hamilton, 30 diamonds, .47 carats	134.50
#606 - 14 K white gold mesh bracelet watch 17 Jewel Hamilton, 3 diamonds, .45 carats	167.30
#1883 Platinum 17 jewel Hamilton watch, 22 diamonds, .57 carats	186.15

#2110 Platinum 17 jewel Hamilton watch, 46 round and 6 baguettes, 1.64 carats	424.15
#1728 Platinum 17 jewel Hamilton watch, 36 diamonds, 1.31 carats	336.95
#1752 Platinum 17 jewel Hamilton watch, 30 round and 6 baguettes, 1.46 carats	350.55
#1723 Platinum 17 jewel Hamilton watch, 48 round and 12 baguettes, 1.93 carats	468.00
#1746 Platinum 17 jewel Hamilton watch, 38 diamonds, .94 carats	285.00
14 K Gent's Linde Star Ring 8.25 carats, 2 diamonds	80.00
14 K Gent's Linde Star Ring 11.25 carats	95.00
14 K Gent's Genuine Star Sapphire Ring, 9.69 carats	75.00
14 K Gent's Genuine Star Sapphire Ring, 6 carats	200.00
14 K Gent's Genuine Star Sapphire Ring, 12 carats	175.00
14 K Gent's Genuine Star Sapphire Ring, with one baguette	75.00
14 K Ladies Genuine Star Ruby, white gold mounting, star 3 carats and 2 diamonds	75.00
14 K twin pearl ring with 2 diamonds	20.00
14 K ladies diamond pearl ring	80.00
14 K ladies diamond pearl ring	80.00
14 K ladies cultured pearl diamond ring	48.00
14 K ladies cultured pearl ring 7½ MM	15.00
14 K ladies cultured pearl diamond ring	56.14
14 K ladies diamond pearl ring, yellow gold	80.00
14 K ladies diamond pearl ring, yellow gold	80.00
	$6591.12

Lowest Cost Based on Assured's Books and Records $6525.21

TOPLIS & HARDING, WAGNER & GLIDDEN, INC.

By .....

Adjuster

No. 211

Office Supreme Court, U.S.
FILED
JUL 23 1958
JOHN T. FEY, Clerk

In the United States Court of Appeals
For the Seventh Circuit

No. 12169

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff-Appellant,
vs.
CHICAGO UNION STATION COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Trial Judge.

APPELLEE'S BRIEF AND APPENDIX.

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33 South Clark Street
Chicago 3, Illinois
Attorney for Appellee

ERWIN W. ROEMER
JOSEPH P. CARR
Of Counsel

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12169

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff-Appellant, vs. CHICAGO UNION STATION COMPANY, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Trial Judge.

APPELLEE'S BRIEF.

I.

STATEMENT OF FACTS.

A. NATURE OF THE CASE.

This action was brought by plaintiff as a subrogee of one Harry L. Mintz to recover damages for the loss of certain jewelry. Harry L. Mintz had delivered two traveling bags containing jewelry claimed to be worth approximately $34,000 to defendant's Red Cap without informing the Red Cap of the unusual value of the contents. Subsequently the sample cases were stolen from the Red Cap by a thief who posed as Mintz' brother. The case was tried

by the court. The court found for the defendant and entered findings of fact and conclusions of law. Plaintiff filed its motion to set aside the findings of fact, conclusions of law, and the judgment order and moved the court to enter judgment for the plaintiff. In the alternative, plaintiff also filed its motion for a new trial.

B. STATEMENT OF THE FACTS.

The summary of facts in plaintiff's Brief is misleading and inaccurate. The facts are summarized as though the court below found in favor of appellant and in some cases the summary contradicts the findings of the trial judge.

Harry L. Mintz, a jewelry salesman and an experienced traveler, arrived at Union Station intending to board a train to Minneapolis. He had with him two cases containing jewelry, as well as a personal bag. Mintz delivered the three bags to a Red Cap and received baggage checks for them. Mintz never told the Red Cap that the bags were valuable or that they contained a fortune in jewelry. Moreover, Mintz did this knowing that the Red Cap would be forced to leave the bags unattended while delivering the bags to the various cars of the train to which he was making deliveries (App. 41). Mintz left the Red Cap and boarded the train. Some time after Mintz had left, a man came up to the Red Cap and said to him, "We are not making the trip by train", and that they were going to drive to St. Paul or Minneapolis. The Red Cap asked who wasn't making the trip and the man said, "These three bags", and he pointed out Mintz' bags (App. 75). The Red Cap told the man that he couldn't turn over the bags without the claim checks and without the return of the claim checks the bags would have to go to St. Paul, where they could be picked up. The Red Cap said further that he would be ten more minutes loading this train: that

if the stranger didn't return by that time with the claim checks, the bags would be down at the train (App. 76).

Three to five minutes later the same man returned and said that they were in a hurry. The Red Cap asked where the claim checks were. The man said his brother was just finishing a telephone call, and that he would be there. He asked if the Red Cap would please put the bags in a cab for him. The Red Cap took Mintz' bags to the cab court and placed the big bag in a cab standing there. The Red Cap and the stranger then stood and awaited the arrival of Mintz with the claim checks. The stranger just stood there looking into the station as though he, too, were awaiting Mintz (App. 77). Then the Red Cap heard his name or his number called and he was told to hurry as the train would be in any minute, and it was getting close to departure time. He had no alternative but to seek help, either somebody to watch Mintz' baggage or somebody to take the other baggage to the train so that he could remain with the man (App. 77). The Red Cap stepped through the nearby double doors to the station looking for help; and as he did so, he heard the motor of the cab. He turned around and saw the cab pulling away (App. 77).

The Red Cap was never told that the bags contained anything of unusual value (App. 73-74). He was astonished when he found the bags contained jewelry (App. 87-88).

Although Mintz testified at the trial that he told the Red Cap that his bags were valuable, it developed that in two statements made by Mintz shortly after the loss he never said that he had told the Red Cap that the bags were valuable. The trial court held that Mintz had never told the Red Cap of the value of the bags.

Defendant's Red Caps held themselves out to the public for the carriage of traveling bags to and from cars (App.

13). It is, of course, common knowledge that Red Caps are supplied for the handling of personal baggage.

Mintz contended that the amount of jewelry lost was $34,605.88. However, the evidence showed that shortly after the loss he filed a claim with his insurance company in which he stated that his total inventory at the time of the loss was $21,844.92 (App. 50, 136). Mintz relied for his proof of loss upon a document prepared by him after the loss had occurred.

SUMMARY OF ARGUMENT.

Defendant's Red Caps held themselves out to the traveling public for the handling of bags containing personal property or baggage (App. 13; Appellee's App. 2a).

Mintz never informed defendant's Red Cap that his baggage contained items of unusual value (App. 73-74, 93); defendant's Red Cap did not know that the bags contained anything of unusual value (App. 87-88).

Defendant was not a bailee for hire of the contents of Mintz' sample cases.

The legal fraud of Mintz in failing to disclose the unusual value of the contents of his sample cases precludes recovery here.

There was no voluntary misdelivery by defendant's Red Cap to a person not entitled to receive the bags; the bags were stolen from the Red Cap (App. 75-77, 94).

Assuming a misdelivery, plaintiff cannot recover because of the contributory negligence of Mintz in failing to disclose the contents of the sample cases.

Mintz was guilty of gross negligence which contributed to the loss of the sample cases in failing to inform the Red Cap of the unusual value of the contents.

Since both plaintiff and defendant tried the case below on the theory that the law of the State of Illinois was controlling and that the case was governed by the law of bailment and not the law of carrier and passenger (Appellee's App. 1a, 2a), that theory is the law of the case. Hence, the Interstate Commerce Act is inapplicable on this appeal.

Defendant is not a carrier within the meaning of the Interstate Commerce Act. No issue of limitation of liability is involved in this case since no tariff was pleaded or proved. The common law and not the Interstate Commerce Act is controlling.

Under the common law defendant was not the insurer of the contents of Mintz' sample cases since those contents were never received by defendant. Mintz' legal fraud precludes recovery in this case.

The evidence is insufficient to establish the amount of plaintiff's loss.

THE CONTESTED ISSUES.

I.

Was defendant a bailee for hire of the contents of Mintz' sample cases?

II.

Did the actions of defendant's Red Cap in retaining control of the sample cases, although placing them in a taxi cab, while waiting for the appearance of Mintz, constitute a misdelivery?

III.

Did the failure of Mintz to tell the Red Cap that his sample cases contained a fortune in jewelry influence the Red Cap to place the bags in a position from which they could be stolen?

IV.

Since plaintiff admitted in the court below and tried the case on the theory that the law of the State of Illinois was controlling, is it not the law of the case that the law of Illinois controls?

a. Even if the law of Illinois is not the law of the case, is defendant a carrier under the Interstate Commerce Act?

b. Since no tariff was pleaded, is not the common law of liability as it existed prior to 1906 applicable herein; since no limitation of liability was sought, is not the Carmack Amendment inapplicable?

c. Is a carrier required to make inquiry as to the nature and value of property handled by its Red Caps?

V.

Is not the plaintiff barred from recovery herein by the legal fraud of Mintz in failing to disclose the fortune in jewelry carried by him?

II.

PROPOSITIONS OF LAW.

I.

Defendant was not a bailee for hire for the contents of Mintz' sample cases.

Michigan Cent. R. R. Co. v. Carrow, 73 Ill. 348, 355, 359, 24 Am. Rep. 248 (1874).

Crosby v. 20 Fifth Avenue Hotel Co., 173 Misc. 604, 17 N.Y.S. 2d 498 (1940).

Stuart v. D. N. Kelley & Son, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954).

Barnette v. Casey, 124 W.Va. 143, 19 S.E. 2d 621, 623, 624 (1942).

Drybrough v. Veach, 238 S.W. 2d 996, 997 (Ky. Ct. App. 1951).

Corpus Juris Secundum, Vol. 8, p. 249 (Bailments, sec. 15).

II.

There was no misdelivery by defendant's Red Cap of Mintz' cases; nor, assuming a misdelivery, is there any liability on defendant in the circumstances of this case.

Hartley v. Robinson, 78 Ga. 594, 51 S.E. 2d 617, 618 (1949).

Crosby v. 20 Fifth Avenue Hotel Co., 173 Misc. 604, 17 N.Y.S. 2d 498 (1940).

Roger Wurmser, Inc. v. Interstate Hotel Co. of Neb., 148 Neb. 660, 28 N.W. 2d 405, 407 (1947).

I. & St. L. R. R. Co. v. Herndon, 81 Ill. 143, 149 (1876).

Stuart v. D. N. Kelley & Son, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954).

Barnette v. Casey, 124 W.Va. 143, 19 S.E. 2d 621, 623, 624 (1942).

Corpus Juris Secundum, Vol. 8, p. 249 (Bailments, sec. 15).

III.

Mintz was guilty of gross negligence which caused the loss of the sample cases.

I. & St. L. R. R. Co. v. Herndon, 81 Ill. 143, 149 (1876).

Roger Wurmser, Inc. v. Interstate Hotel Co. of Neb., 148 Neb. 660, 28 N.W. 2d 405, 407 (1947).

IV.

The law of the case is that the law of the State of Illinois is controlling and, hence, the Interstate Commerce Act has no application to the case at bar.

See Argument.

a. **Defendant is not a carrier as defined in the Interstate Commerce Act.**

Horelick v. Pennsylvania R. R. Co., 24 N.J.S. 413, 94 A. 2d 685 (1953), aff'd 13 N. J. 349, 99 A. 2d 652.

b. **The Interstate Commerce Act is inapplicable where no tariff is relied upon; there is no attempt by the defendant to "limit liability" in this case.**

Corpus Juris Secundum, Vol. 13, p. 182 (Carriers, sec. 94).

Nothnagle v. N.Y.N.H.&H. R.R. Co., 346 U.S. 128, 133 (n. 7) (1953).

York Co. v. Central R. R., 70 U.S. 107 (1865).

c. Defendant had no obligation to inquire into the nature and value of the contents of Mintz' sample cases.

Nothnagle v. N.Y.N.H.&H. R.R. Co., 346 U.S. 128, 133 (n. 7) (1953).

Michigan Cent. R. R. Co. v. Carrow, 73 Ill. 348, 350, 24 Am. Rep. 248 (1874).

Humphreys v. Perry, 148 U.S. 627 (1893).

III.

ARGUMENT.

Although plaintiff in stating the Nature of the Case contends that its appeal is both from the order denying plaintiff's motion for the entry of judgment in its favor, and from the order denying plaintiff's motion for a new trial, its argument seems to be confined to a contention that plaintiff is entitled to judgment as a matter of law. In the conclusion of its Brief, plaintiff asks only that judgment be entered in its favor. Since plaintiff has not argued that it is entitled to a new trial, defendant assumes that that point has been waived. Furthermore, although plaintiff lists as a contested issue whether the evidence was sufficient to establish the amount of plaintiff's loss, no argument is made on that point. Again defendant assumes that the point has been waived.

The case was tried below by both plaintiff and defendant on the theory that the law of the State of Illinois was controlling and that the general law of bailment applied. Both plaintiff and defendant expressly repudiated any claim that the Carmack Amendment of the Interstate Commerce Act was applicable to this case (Appellee's App. 1a, 2a). The theory on which the case was tried below is the law of the case and is controlling.

Under the law of bailment, in order for the plaintiff to recover, there must be shown the creation of a bailment, a loss of the bailed article, negligence of the bailee which caused or contributed to the loss and finally, freedom from negligence contributing to the loss on the part of the bailor and freedom from fraud. 8 C.J.S. Bailments, Secs. 15, 26; *Roger Wurmser, Inc.* v. *Interstate Hotel Co. of Nebraska*,

148 Neb. 660, 28 N.W. 2d 405, 407 (1947); *Michigan Central R.R. Co. v. Carrow*, 73 Ill. 348, 360 (1874).

I.

Defendant was not a bailee for hire for the contents of Mintz' sample cases.

In insisting that defendant was a bailee for hire plaintiff relies upon a passage in 6 *American Jurisprudence*, Sec. 72, p. 2281, and cites in support of the proposition three irrelevant cases.

The author of the note in *American Jurisprudence* asserts that the larger number of "the more recent decisions" support the view that the bailee of a sealed receptacle is the bailee of its contents even though those contents are unusually valuable and no disclosure has been made to him. This assertion is evidently a carryover from Ruling Case Law. An examination of the cases relied upon by the author fails to reveal any support for this proposition except for a few safety deposit cases and innkeeper cases. Indeed, *American Jurisprudence* points out in paragraph 73 that there is opposition to the view advanced by the writer. The cases in support of that opposition are not only later but much better reasoned than the so-called "more recent decisions". Indeed, the view that there is not a bailment of the contents appears most recently in *Stuart v. D.N. Kelley & Son*, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954). It is apparent that the footnotes in *American Jurisprudence* do not support the view advanced in the text.

The criticism of a text such as *American Jurisprudence* is not lightly to be entered upon. However, an explanation of the textual error probably lies in the fact that the writer failed to realize the distinction between bailees who are

ing and bailees whose course of business is limited to articles of no great intrinsic value. Thus, the writer in *American Jurisprudence* relies upon cases involving safety deposit boxes in banks and safes in inns and hotels for the proposition that the bailee has accepted the bailment of the contents of those receptacles. Obviously, there is a clear distinction between a bailee who holds himself out for the deposit of articles of unusual value such as banks and innkeepers and a bailee of baggage of passengers. It serves no useful purpose to tell a bank that an article of great value has been stored in the safety deposit box for it is exactly that purpose for which safety deposit boxes are designed. On the other hand, it is of the utmost importance to inform a Red Cap that a traveling bag contains articles of unusual value since both the method of operation and the degree of protection afforded bags by a Red Cap are not designed for articles of unusual value. The record in this case shows that Red Caps must leave bags unguarded as they perform their duties. Harry Mintz knew this (App. 41). Red Caps are not accustomed to functioning as Brinks' guards.

The distinction between bailments directed to articles of great value and those of ordinary value was not missed in *Corpus Juris Secundum* in which it is stated in Volume 8 at p. 249 (Bailments, sec. 15):

> "Since, except as the rule may be modified in the case of special relationships, such as those of common carriers, innkeepers, or warehousemen, as appears in the titles Carriers, Innkeepers, and Warehousemen and Safe Depositaries, respectively, the duties and responsibilities of a bailee cannot be thrust on a person without his knowledge or consent, or against his protest, it is essential to a bailment that there be an *acceptance* of the subject matter by the bailee." (emphasis added)

To avoid a mere pitting of *Corpus Juris Secundum* against *American Jurisprudence* it should be pointed out that there are many cases overlooked by *American Jurisprudence* which, in the absence of special relationship, hold that a bailee of a receptacle is not a bailee of undisclosed contents, either of unusual value or whose presence is not to be anticipated.

Crosby v. *20 Fifth Avenue Hotel Co.*, 173 Misc. 604, 17 N.Y.S.2d 498 (1940).

Stuart v. *D. N. Kelley & Son*, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954).

Drybrough v. *Veach*, 238 S.W. 2d 996, 997 (Ky. Ct. App. 1951).

Barnette v. *Casey*, 124 W.Va. 143, 19 S.E. 2d 621 (1942).

In the *Crosby* case the court said (17 N.Y.S.2d at p. 499):

> "A hotel is not chargeable as a bailee for a valuable antique left in a trunk where plaintiff did not give notice that the trunk contained anything but ordinary personal luggage. *Waters* v. *Beau Site Co.*, 114 Misc. 65, 186 N.Y.S. 731; *Magnin* v. *Dinsmore*, 62 N.Y. 35, 20 Am. Rep. 442."

In the *Stuart* case, the plaintiff sought to recover for articles of clothing left on a boat. In denying recovery the court said (117 N.E. 2d p. 162):

> "'A bailment is essentially a consensual transaction arising out of a contract express or implied * * * and there must be an acceptance by the bailee of the goods forming the subject-matter of the bailment before there can be any bailment. * * * It is plain the law does not thrust upon one the liabilities of a bailee without his knowledge or consent, and equally obvious that while an acceptance may be implied the law will not infer such until there is something to show notice or

knowledge of the alleged bailee that the goods are in fact in his possession.'

• • •

It would seem, despite intimations to the contrary, that knowledge or consent on the part of the bailee is no less essential to the creation of a gratuitous bailment than to the creation of a bailment for hire. We hold only that there was no bailment for hire here of the property in question and that is sufficient to dispose of the case, for the plaintiff concedes that proof of a bailment for hire is essential to recovery."

In *Barnette* v. *Casey*, 124 W.Va. 143, 19 S.E. 2d 621, 623, 624 (1942), suit was brought to recover for a fur coat stolen from a bailed automobile. In denying recovery the court made clear that the contents of a bailed article would not be part of the contract of bailment unless the bailee could reasonably expect the contents to be in the receptacle or unless he were given notice of their presence. The court said:

"We do not think that, in this instance, the bailee was called upon to assume that there was any property in the automobile other than the tools, tires, etc., which *might reasonably be expected to be carried therein.* (at p. 623)

• • •

"In some circumstances involving property stolen from bailee, or lost through his negligence, the bailee has been held liable. Woodruff v. Painter, 150 Pa. 91, 24 A. 621, 16 L.R.A. 451, 30 Am.St.Rep. 786, was a case where a customer in a shop engaged in making a purchase was invited to lay aside his wearing apparel which contained a watch, an article customarily carried, and the storekeeper was held for its negligent loss. This rule was later applied in Hunter v. Reed, 12 Pa. Super. 112, but in that case *a diamond ring, not designed to be carried in the fob pocket of a pair of trousers, was held to be outside the rule.* (at p. 624)

• • •

> For example, he would be charged with constructive knowledge that a piece of baggage probably contained property of some value, although he might not know the particular type of property or the value thereof, contained therein. He probably would not, in the absence of actual notice, be liable for *extremely valuable property such as jewelry, or a type of property not ordinarily carried as baggage and left in a vehicle.*" (at p. 624) (emphasis added)

Defendant submits that the above cases are dispositive of the issues in this case. Somehow or other those seemed to have been overlooked both by the writer of the article in *American Jurisprudence* and the plaintiff. It is clear that a bailee for hire is not a bailee of the contents of a sealed receptacle in the absence of notice of the unusual value of the contents.

It is a distortion of the record to imply that defendant's Red Cap knew that Mintz' sample cases contained valuables simply because he recognized them as sample cases. The Red Cap assumed that the bags were sample cases and assumed that they were valuable to Mintz as samples in the way that tooth brushes would be valuable to a tooth brush salesman. The Red Cap was surprised that jewelry would be carried in sample cases like this (App. 87, 88).

The plaintiff has cited two Illinois cases in support of its proposition that the bailee of a sealed receptacle is the bailee of the contents. These are:

> *National Safe Deposit Co.* v. *Stead*, 250 Ill. 584 (1911).
>
> *Sadler* v. *National Bank of Bloomington*, 403 Ill. 218, 229-30 (1949).

The *Stead* case is not an action for loss of the contents of a bailment. Nothing more was decided in that case than

that a bailment was created between a safe deposit company and its lessee. Since both the *Stead* and *Sadler* cases involved the contents of safe deposit boxes, it is quite apparent that they set forth a sound rule of law. Defendant has already pointed out the distinction between bailments which it is anticipated will involve valuable articles and bailments where there is no such anticipation. Even the dictum in the *Stead* case is unexceptional; it does not refer to a situation where items of unusually great and unanticipated value are contained in the receptacle.

The law in Illinois governing the bailment of baggage is that set forth in *Michigan Cent. R. R. Co.* v. *Carrow*, 73 Ill. 348. The facts in that case are almost on all fours with the instant case. Although the action involved a carrier and a passenger the court was also asked to apply the Illinois law on bailments. Because it is the leading case in Illinois, and much cited elsewhere, we take the liberty of quoting from it in unusual length. The Court said at pp. 355 and 359:

> "Nor do we see how appellant can be held liable in this case, as a bailee for hire. The company entered into no such agreement with appellee, either expressed or implied. The contract with him was simply to carry him as a passenger, and his personal luggage. It was not bound to carry anything he might choose to bring with him as baggage, no matter how costly or delicate in structure, or how much attention would be required for its safe carriage.
>
> "As was said in the *Chicago and Cincinnati Air Line Railroad Co.* v. *Marcus, supra*, [38 Ill. 219] 'When a person, therefore, under the pretense of having baggage transported, places in the hands of the agents of a railroad, merchandise, jewelry and other valuables, without notifying them of its character, he practices a fraud upon the company.'

"There is no pretense for saying that any of the employees on the train, or the agent who received and checked it, had the slightest knowledge the trunk contained anything else than baggage proper. Had appellee disclosed to the baggage-master, at the depot, the fact his trunk contained $30,000 worth of jewelry, it would have been his duty to reject it. He, no doubt, would have been told it was express matter, and not baggage. This important fact was not divulged. It was all-important to the carrier, as indicating the amount of risk it was about to assume. Appellee himself having treated it as baggage, and not as merchandise of extraordinary value, the company was authorized to do the same. Any other rule would permit the passenger to practice an imposition upon the carrier.

"Appellee could not make the company bailee of goods, as for hire, without its consent. Story on Bailments, sec. 60; *Lethbridge* v. *Phillips*, 2 Starkie, 544.

"It is inconceivable the company would have received this trunk at all, had its contents been made known. It had no means of taking proper care of packages of such unusual value. The servants employed in charge of the baggage-car, had not been employed with a view to place in their charge property of that character. It was such property as was usually sent by express. The proof shows there was another trunk in the car that was consumed, that contained $21,000 worth of watches and jewelry.

"No compensation was paid by appellee for the transportation of this valuable property. His passage fare was only for the carrying of himself and his personal baggage that was contained in the trunk. Without attributing any sinister motive to appellee, we can regard this transaction in no other light than an attempt to have this large amount of property carried free of charge, contrary to the known custom of the company.

"It makes no difference that others may have had some valuable merchandise carried as baggage, perhaps with the knowledge of the company. If such was the fact, it was wrongful, because in contravention of the established rules of passenger carriers. The time has now arrived for determining at whose risk this property was. Whether any fraud, in fact, was intended, it is not necessary to inquire. The transaction was fraudulent in law, and this is sufficient, by all the authorities, to avoid any contract, whether express or implied. The fact appellee offered as common baggage, merchandise of extraordinary value, is a legal fraud, such as will excuse the performance of a contract.

"In *Cahill* v. *The L. and N. W. Railway Co., supra*, [10 C. B. (N. S.) 154] Byles, J., says 'the conduct of the defendant, without imputing to him any fraudulent intent, in delivering a package of this description, without communicating the fact it contained merchandise, was in the nature of concealment, and amounted to a positive representation it contained ordinary personal luggage only. If that be so, there was no bailment and no contract.'

"Where goods have been placed in the carrier's possession without his knowledge and consent, as they were in this case, there can be no contract of bailment. The want of fair dealing on the part of the bailor is a full answer to an action upon any implied contract of bailment for hire. Angell on Carriers, sec. 140; *Batson* v. *Donovon, supra* [4 B. & A. 21].

* * *

"There is nothing in the evidence from which the conclusion could be fairly drawn the company had knowledge of the contents of appellee's trunk, nor was there anything in its appearance that made it the duty of the agents to make inquiry as to what it really contained. Who would suppose a small trunk, which could be readily picked up and carried off by any one,

would be suffered by the owner to be thrown upon the platform, in the nighttime, and treated as baggage of ordinary value, when in fact it contained $30,000 worth of diamonds and costly jewelry? To hold the company liable, in the event loss should occur, for not making investigation as to the contents, would be to extend the responsibility of railway companies to an unprecedented extent beyond anything demanded by any considerations of public policy. The more reasonable rule, and the one best calculated to subserve the ends of justice, is, the passenger, who has the information, should apprise the company of the extraordinary value of the package he desires to have checked as baggage, and, upon failure to do so, if loss ensues, he must bear the consequences.

"Under the most friendly criticism, appellee's conduct savors of legal fraud, not to characterize it by any stronger terms. He is not, therefore, in a position to demand any favorable construction of the evidence. According to the view we have taken, the verdict is contrary to the law and the evidence.

"The judgment of the court below must be reversed."

McKibben v. *Wisconsin Cent. Ry. Co.*, 110 N.W. 964 (Minn. 1907), cited by plaintiff, is, of course, a case taken from another jurisdiction. Moreover, the *McKibben* case is distinguishable in that the sample cases there did not contain articles of unusually great value. The case does not hold that a baggage agent is chargeable with knowledge that a sample case contains articles of *unusually* great value. It merely holds that the baggage agent was chargeable with knowledge that sample cases contain merchandise, not that they contain a fortune in jewelry.

II.

There was no misdelivery by defendant's Red Cap of Mintz' cases; nor, assuming a misdelivery, is there any liability on defendant in the circumstances of this case.

Whether or not a misdelivery took place under the evidence in this case was a question of fact for the trial judge. Rettig's testimony clearly shows that he merely placed the bags in a convenient spot and that he never intended to surrender possession and control of the bags until he received the baggage checks. In the brief moment that he sought help, the stranger posing as Mintz' brother stole the bags. Never, according to Rettig's testimony, did he intend to yield control of the bags without the surrender of the checks. Defendant submits that the specific finding by the trial court that there was no misdelivery of these bags is conclusive on the issue. In his opinion Judge Barnes said:

> "The result of that is that I don't think there was a contract of bailment, and further, what happened when that bag disappeared wasn't any different than though it had been taken off by stealth when the usher wasn't about, not a particle of difference.
>
> "A man came up and said, 'We are not going by train. We are going by automobile. We are going to drive up. My brother is telephoning' and, in effect, he said, 'We want to take those bags out to the cab. We are not going by train.'
>
> "The usher demurred but was persuaded. Here he had a truckload of baggage to go out to the Burlington train, and he thought his customer had changed his mind and didn't want to go by train, so he was torn between a desire to get the baggage to the train and a desire to accommodate these men who had changed their minds and were not going to use the train.

"He was tricked into taking the baggage off his truck. He was tricked into putting it into an automobile, and when he turned around to get somebody to watch the merchandise in the automobile or to take the truck to the Burlington train, the purported brother drove off.

"I can't see a particle of difference in principle, between that and than if that man or some other man had come up, that alleged brother had come up and by stealth, taken the three bags off the truck, not a particle.

"He didn't intend to deliver those bags until he got his checks, and they were stolen from him while he was engaged in a natural effort to accommodate the traveling public." (App. 94).

In all the cases cited by the plaintiff, there was a clear "misdelivery". In the case at bar there was no "misdelivery" but a theft by the stranger as much as if he had picked up the bags in the station and had run away. In order to effect a delivery, (or a misdelivery), there must be a surrender of possession and the yielding of custody and control. In 8 C. J. S. Bailments, sec. 15, p. 249, the rule is stated:

"Such a full delivery of the subject matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner and all other persons, give the bailee sole custody and control, make him liable to the owner as the sole custodian of the property in the event of his neglect or fault in discharging his trust with respect to the subject matter, and require a redelivery of it by him to the owner or other person entitled to receive it after the trusts of the bailment have been discharged."

In *Hartley* v. *Robinson*, 78 Ga. 594, 51 S.E. 2d 617, 618 (1949), the court held that placing an automobile at the

disposal of parking lot attendants did not constitute a delivery of a car.

The mere fact that the stranger was given an opportunity to steal the sample cases, did not constitute a delivery to him, any more than if an opportunity had been given by the Red Cap leaving his truck momentarily to deliver other bags into another car of the same train.

Plaintiff's review of the law on misdelivery is impressive on the surface, but the cases cited are inapplicable to the facts in the present case as found by the trial judge. In all the cases cited by plaintiff the bailed article was actually turned over to a third person with the intention of parting with its possession. Perhaps the closest case cited by plaintiff is *Baer* v. *Slater*, 158 N.E. 328 (Mass. 1927), where defendant delivered merchandise to a man posing as an express company employee. The distinction between that case and the instant case is obvious. In the *Baer* case the defendant handed over the bailed article to the impostor and intended that it leave the premises with him. The *Baer* case would be relevant to the instant case only if the defendant there had placed the bailed article on the counter, had said now we will wait for someone to appear with evidence of your authority to claim the article and while the defendant turned away for a moment the impostor had grabbed the bailed article and run from the store. Obviously, on such assumed facts there would have been no misdelivery, just as there was no misdelivery in the instant case.

As a matter of law, moreover, there was no misdelivery by the defendant's Red Cap in this case.

As we have previously shown, there was no bailment of the contents of the sample cases and, hence, defendant was not a bailee of the jewelry.

Crosby v. *20 Fifth Avenue Hotel Co.*, 173 Misc. 604, 17 N.Y.S. 2d 498 (1940).

Stuart v. *D. N. Kelley & Son*, 331 Mass. 76, 117 N.E. 2d 160, 162 (1954).

Barnett v. *Cason*, 124 W.Va. 143, 19 S.E. 2d 621 (1942).

Since there was no delivery of the jewelry by Mintz there could be no misdelivery by the Red Cap.

Moreover, plaintiff ignores Mintz' contributory negligence in failing to inform the Red Cap of the unusual value of the jewelry in his bag. Mintz was a thoroughly seasoned traveler, knew the methods used by Red Caps to distribute baggage, and knew that baggage would necessarily be left unguarded while the Red Cap was carrying out his duties.

In *Roger Wurmser, Inc.* v. *Interstate Hotel Co. of Neb.*, 148 Neb. 660, 28 N.W. 2d 405, 407 (1947) the plaintiff left a bag containing jewelry in the hotel vault. The court denied recovery as a matter of law, stating at 28 N.W.2d 407, 408:

> "From the pleadings it is evident that plaintiff's salesman and employee, Samuel Kutner, at no time, while dealing with the employees of the defendant, informed them of the nature of the contents of his dark brown saddle-leather sample case, being a case about 24 inches long, 16 inches high, and 8 inches wide, marked with the initials 'R.W.,' nor of the value thereof, same allegedly consisting of precious stones of the reasonable wholesale market value of $187,755.04. It is admitted by plaintiff in both its original and reply brief that he did not do so. [p. 407]. . . .
>
> "[3] Following our previous holding we can come to no other conclusion than that the plaintiff is barred from recovery as a matter of law because of its own contributory negligence in the failure of Kutner to inform the defendant's employees that his sample case

contained precious stones of the value of $187,755.04 which failure is obviously more than slight negligence." [p. 408]

Even if we were to concede that a "misdelivery" occurred, as it clearly did not, Mintz' contributory negligence would bar recovery. Plaintiff contends that contributory negligence is irrelevant in a "misdelivery" case and cites *I.&St.L. R.R. Co.* v. *Herndon*, 81 Ill. 143 (1876). That case, however, is an authority for the defendant. The court held that contributory negligence is a defense but that in the particular circumstances the plaintiff's negligence did not contribute to the loss. The court said (81 Ill. 149):

> "Negligence of the plaintiffs, which will prohibit a recovery for an injury sustained by reason of defendant's negligence, must be such as contributes to the injury complained of; that is, it 'must be such, that by the usual course of events, it would result, unless independent, disturbing moral agencies intervene, in the particular injury,' Wharton on Negligence, §324. Whatever negligence plaintiffs may have been guilty of, therefore, in not calling for the trees within a reasonable time, is an element that can have no proper influence in the present case, for no one pretends that its necessary tendency was to induce the defendant's agent to take the law into his own hands, and dispose of the trees to suit his pleasure."

Here the "misdelivery" took place obviously because of Mintz' failure to inform defendant's Red Cap of the presence of highly valuable jewelry in his bags.

III.

Mintz was guilty of gross negligence which caused the loss of the sample cases.

In arguing this point plaintiff ignores the rule of law which provides that the evidence be viewed in the light most favorable to the party in whose favor a judgment is

rendered. Contrary to the statement on page 23 of plaintiff's Brief, Mintz never told the Red Cap that the bags were valuable. In his statement given at Union Station on September 13, 1955, two days after the loss, he did not say that he had told the Red Cap that the bags were valuable (App. 124-130). In the statement to his insurance company made shortly after the loss, he did not say that he had told the Red Cap that the bags were valuable (App. 134-136). Moreover, the Red Cap, Rettig, denied that he knew that the sample cases contained anything of any special value (App. 87). Rettig also related the conversation between himself and Mintz (wholly under cross-examination by plaintiff's attorney) and expressly denied that any such statement was made by Mintz (App. 73-74). Indeed, Mintz' attitude when he handed over his bags is tellingly revealed from the testimony of Rettig (App. 74):

> "A. After giving the gentleman who owned the three bags his receipts, I went into a little bit about the information he would need to claim these bags, and I was told he had made this trip before and it wasn't necessary."

The evidence amply supports defendant's contention that Mintz never mentioned the value of the contents of the sample cases. The trial judge, who had an opportunity to observe Mintz on the witness stand, reached the conclusion set forth at page 93 of the Appendix:

> "Therefore, he did not—and I am just as sure of that as I am sure of anything about this case—tell that red-cap that that bag was valuable. And when he made his statement on the following Tuesday in the Union Station, he didn't say that he said that, and when he presented his statement to the insurance company, he didn't say that he said that."

It was gross negligence on the part of Mintz, knowing as he did the traditional methods used by Red Caps in handling baggage, to turn a fortune in jewelry over to a Red Cap without any indication that the bags contained anything of unusual value. The court below correctly characterized Mintz' conduct in his colloquy with plaintiff's counsel at the conclusion of plaintiff's argument. That colloquy is as follows (Appellee's App. 2a):

> "Mr. Magid: The United States Supreme Court says that. The 73 Illinois and *Perry* vs. *Humphreys*, and the United States Supreme Court say notwithstanding the no notice which exonerates them from liability, that exoneration does not take place when they are guilty of gross negligence, and what is more gross negligence than has been proved in this case on the part of the defendant?
>
> "The Court: I could answer that question for you. You have answered it several times.
>
> "By Mr. Magid: Yes, sir.
>
> "By the Court: Giving a thirty-six thousand dollar bag to a redcap in the Union Station without telling him what it is."

The case relied on by plaintiff (*I. & St. L. R.R. Co. v. Hetudon*, 81 Ill. 143, 149 (1876)) points out that the contributory negligence of a person in Mintz' situation is a bar to recovery if it contributed to the loss. To the same effect is *Roger Wagoner, Inc. v. Interstate Hotel Co. of Neb.*, 148 Neb. 630, 28 N.W. 2d 405, 407 (1947), quoted by defendant in point II of this Brief.

Obviously the failure of Mintz to warn the Red Cap of the fortune in jewelry contained in the sample cases had an effect on the conduct of the Red Cap. The method used by the impostor to get the bags outside the station is a common occurrence in railroad stations and would ordinarily arouse no suspicion. Suspicion would have

been aroused, however, if the Red Cap knew that the samples in the sample cases were actually a fortune in jewelry. On the other hand, no Red Cap would suspect that an elaborate plot would be laid to steal sample cases full of items like tooth brushes, which the Red Cap thought the bags might contain (App. 87). As Judge Barnes concluded, the gross negligence of Mintz caused, or at least contributed to, the loss of the jewelry.

IV.

The Interstate Commerce Act has no application to the case at bar.

This case was tried by both parties on the theory that the law of bailment is applicable and that the law of the State of Illinois is controlling (Appellee's App. 1a, 2a). Moreover, in his closing argument plaintiff's counsel expressly repudiated reliance on the Interstate Commerce Act (Appellee's App. 2a). Since the case was tried solely on the theory that the law of the State of Illinois was controlling, that theory is now the law of the case and there is no merit to plaintiff's contention that it is entitled to recover under the Interstate Commerce Act.

However, there can be no recovery in this case even under that act.

a. Defendant is not a carrier as defined in the Interstate Commerce Act.

It is true that defendant is an agent of the railroads using its facilities. Defendant, however, is not seeking to limit its liability under the provisions of the Interstate Commerce Act.

It is not true that Title 49, Section 1(3) of the United States Code Annotated defines carriers to include "ter-

minals" and "terminal facilities of every kind". Railroads, and not carriers, are so defined. The Act refers to terminal facilities, but not to terminal companies. In the only decision on this question the Appellate Division of the Superior Court of New Jersey has held that a terminal company such as defendant is not a carrier within the meaning of the Interstate Commerce Act. (*Horelick* v. *Pennsylvania R.R. Co.*, 24 N.J.S. 413, 94 A. 2d 685 (1953).) Section 1(3) of that Act makes a distinction between carriers and terminal companies, and, consequently, the defendant here is not a carrier within the purview of Sec. 20 (11) of the Interstate Commerce Act.

On appeal the Supreme Court of the State of New Jersey expressly refused to rule on the question of whether a terminal company is a carrier under the Act. *Horelick* v. *Pennsylvania R. R. Co.*, 13 N.J. 349, 99 A. 2d 652, 654 (1953). Consequently, the lower court's decision still stands, and it is simply untrue that the Supreme Court of New Jersey held that a terminal company such as the Union Station is a carrier within the meaning of the Act.

b. The Interstate Commerce Act is inapplicable where no tariff is relied upon; there is no attempt by the defendant to "limit liability" in this case.

Plaintiff misapprehends both the effect of Sec. 20 (11) and also the defendant's position. The Interstate Commerce Act prohibits *limitation of liability* on property *received* by a carrier unless certain statutory provisos are fulfilled. Limitation of liability refers to an effort by a carrier to limit its liability by special contract in situations where the common law imposes liability. *York Company* v. *Central R. R.*, 70 U.S. 107 (1865). The issue here, however, is not one of limitation of liability. There is no question but that the defendant would be legally liable for *baggage* received by it. Defendant is not seeking to limit its liability

to an arbitrary figure pursuant to a tariff or a limitation contained in a baggage check. The issue here is whether under the law defendant ever *received* the stolen jewelry. There is a further issue here as to whether Mintz' conduct was such as under the law would bar his recovery. The cases are unanimous in holding that defendant under the law of bailments did not receive Mintz' jewelry. The cases further hold that Mintz' conduct was so fraudulent as to prevent recovery.

Both the *Nothnagle* case (346 U.S. 128) and Sec. 20 (11) of the Interstate Commerce Act are inapplicable to this case. In the *Nothnagle* case the carrier attempted to limit liability on baggage to an arbitrary figure of $25.00. The full value of the baggage lost was $681.00. In holding that the statutory requirements for limitation of liability had not been followed, and that the full value of the baggage could be recovered, the court in no way implied that a small fortune in jewelry could be checked as baggage so that the carrier would be liable for its loss.

Moreover, the purpose of the Carmack Amendment is to void any *limitation of liability* on the part of a carrier by tariff, contract or otherwise unless certain statutory requirements are fulfilled. If the statutory requirements are not met, then the liability of the carrier is that at common law. See 13 C.J.S. Carriers, §94, p. 182; see *Nothnagle* v. *N.Y.N.H.&H. R.R. Co.*, 346 U.S. 128, 133 (n. 7) (1953) where the court said that the present Carmack Amendment restored "*the law of full liability as it existed prior to the Carmack Amendment of 1906.*" The law of full liability as it existed prior to 1906 is accurately set forth in the cases of *Michigan Cent. R.R. Co.* v. *Carrow*, 73 Ill. 348 (1874), and *Humphreys* v. *Perry*, 148 U.S. 627 (1893), and those cases control.

It is apparent that plaintiff's entire argument based upon the Carmack Amendment and the *Nothnagle* case are caused by a misunderstanding of the term "limitation of liability". Limitation of liability referred to in the Carmack Amendment and the *Nothnagle* case is simply a right given to the carrier to limit its liability for the loss of baggage to a nominal sum unless a higher fare is paid.

c. Defendant had no obligation to inquire into the nature and value of the contents of Mintz' sample cases.

The argument by plaintiff on this point again results from its confusion with respect to the meaning of "limitation of liability" and of the *Nothnagle* case. Assuming defendant to be a carrier, it posted no tariff. Consequently, the controlling law is the "law of full liability as it existed prior to the Carmack Amendment prior to 1906". *Nothnagle* v. *N. Y. N.H. & H. R.R. Co.*, 346 U. S. 128, 133 (n. 7) (1953). The law of full liability as it existed prior to 1906 and the duties of the carrier thereunder is set forth in *Michigan Cent. R.R. Co.* v. *Carrow*, 73 Ill. 348, 350 (1874):

> "But, conceding it was of such weight and structure as the baggage-master must have known it was a commercial traveler's trunk, he had no reason to suspect that, in addition to the articles usually carried by a traveler, it contained valuable jewelry, comprising a stock equal, if not exceeding, in value that which is commonly kept in a retail store. Appellee presented it as ordinary baggage, and the officer of the company had the right to rely upon the representation, arising by implication, that it contained nothing else. The law imposed no obligation upon him to make any inquiry as to the contents. Had the agent of the company been informed of the contents of the trunk, or had it been so packed that the nature of its contents was discernible, and the company, with

such knowledge, undertook to carry the goods, there is no reason why it would not be liable as a common carrier, and so the authorities hold. But that is not this case. The carrier in this case had no knowledge of the contents of the package, either direct or constructive."

Obviously there is no duty on the part of defendant to inquire as to the value of the contents of Mintz' sample cases. Mintz, however, was under a duty to tell the defendant whether or not his bags contained any items not ordinarily carried as baggage, especially if they were anything of unusual value.

All that the *Nothnagle* case stands for is that, assuming the Carmack Amendment is applicable, a carrier cannot limit its liability for *bona fide baggage* to an arbitrary figure without informing the passenger of that limitation.

CONCLUSION.

Defendant respectfully contends that the decision below was proper and should be affirmed.

Respectfully submitted,

ERWIN W. ROEMER,
Attorney for Appellee.

ERWIN W. ROEMER
JOSEPH P. CARR,
Of Counsel.

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Harry L. Mintz—

Cross-examination by Mr. Roemer 1a

Argument

By Mr. Magid 1a, 2a

By Mr. Roemer 1a

APPELLEE'S APPENDIX.

2 Mr. Magid: This action can be generally described as a bailment action . . .

181 *Cross-Examination of Harry L. Mintz:*

In my experience I have found that red caps accept bags for various cars on the same train, they distribute the bags among the various cars. Some bags might be for my car and some for other cars . . .

286 Mr. Magid: It is also true in this case that under the doctrine of Erie Railroad vs. Tompkins, the law applicable to this case would be the law of the State of Illinois, and the Erie Railroad vs. Tompkins case is 304 U.S. 464 . . .

289 It is the position of the plaintiff from the evidence, the uncontradicted evidence, that the plaintiff has made out a case in bailment . . .

296 Mr. Roemer: I agree with counsel, and the Circuit Court of Appeals has so ruled, that under the doctrine of Erie Railroad vs. Tompkins, it requires the 297 application of the common law of the State of Illinois . . .

366 Mr. Magid: Mr. Roemer has read to your Honor the opinion from the case of Michigan Central Railroad Company vs. Carrow, 73 Ill. 348, and he stated to you, and I agree with him, that that is the law of the 367 state, and the law of the State of Illinois that applies . . .

391 Mr. Roemer: I don't know whether counsel has been attempting to convert this from a State case to an interstate commerce case, because in his opening

statement he said to your Honor this was a bailment case for hire, and he said that again in his closing argument, and yet he is now trying to bring in other theories that it is a gratuitous bailment.

All of us agreed this was a bailment, but it didn't make any difference under the decisions whether it is gratuitous bailment, bailment for hire, as there can be no recovery if there was a failure to notify the redcap or the carrier of the contents of the bag, and there was nothing about that bag that justified the redcap in assuming that it contained $36,000 worth of jewelry as the Plaintiff now contends . . .

393 Mr. Magid: I think in reading these other cases and the comments on whether or not this is an interstate commerce case or a bailment case or a warehouse case, I simply pointed those cases out to your Honor to show even in the tariff cases where there is a liability, limitation of liability, that the Supreme Court has said the passenger does not stand in the same relation to a situation as the railroad company can, because they are in no position to take these matters to Court. The railroad company can protect itself in a much stronger position.

The United States Supreme Court says that. The 73 Illinois and Perry vs. Humphreys, and the United States Supreme Court say notwithstanding the no notice which exonerates them from liability, that exoneration does not take place when they are guilty of gross negligence, and what is more gross negligence than has been proved

394 in this case on the part of the defendant?

The Court: I could answer that question for you. You have answered it several times.

By Mr. Magid: Yes, sir.

By the Court: Giving a thirty-six thousand dollar bag to a redcap in the Union Station without telling him what it is.

PLAINTIFF'S EXHIBITS 6, 7 and 8.

On the reverse side of plaintiff's exhibits 6, 7 and 8 appear the following words:

> "In case of error: conductor will wire station-master stating number of this check; describing baggage; giving name and address of passenger . . ."

COURT, U. S.
FILED
JOHN T. [illegible]Y, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 211

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioner,

vs.

CHICAGO UNION STATION COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, St. Paul Fire and Marine Insurance Company, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above case on March 28, 1958.

CITATION TO OPINION BELOW.

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, pp. 1a-5a, is reported in 253 F. 2d 441.

(The opinion of the district court was made orally at the conclusion of the trial and is not reported in any official publication. The same is contained in the Appendix filed in the Court of Appeals at pages 92 to 95 and is printed in Appendix B hereto, *infra*, pp. 6a-9a).

JURISDICTION.

The judgment of the Court of Appeals was entered on March 28, 1958, and a rehearing denied on April 28, 1958. (These appear in Appendix A hereto, *infra*, p. 5a). This petition is filed within 90 days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this court is invoked under 49 U.S.C. 1, *et seq.*, and 28 U.S.C. 1254(1), 28 U.S.C. 1331, 1332(a)(1), 1337.

QUESTIONS PRESENTED.

Petitioner's assured, a travelling jewelry salesman, and prospective train passenger holding a ticket for interstate passage, entrusted two sample cases, containing a stock of jewelry samples of a value in excess of Thirty Thousand ($30,000.00) Dollars, belonging to him and to other of Petitioner's assureds, to a redcap who was employed by Respondent, which owns and operates a railroad station serving several interstate railroads. The sample cases were to be redelivered by the redcap to Petitioner's assured aboard one of the trains departing from the station, upon surrender of the claim checks given by the redcap at the time he accepted possession of the receptacles.

The redcap delivered the sample cases to an impostor without requiring the surrender of the claim stubs.

Respondent claimed no limitation of liability by virtue of any tariff schedule filed with the Interstate Commerce Commission, or upon any other basis.

Neither the opinion of the District Court nor that of the Court of Appeals gives any consideration to the question as to whether or not the Carmack Amendment is pertinent to or controlling on the facts of the case.

The questions presented are:

1. Whether the Carmack Amendment to the Interstate Commerce Act, (49 U.S.C. 20(11), if otherwise controlling with respect to the liability of a railroad station serving interstate railroads, for the loss of property, of interstate passengers, handled by redcaps employed by the station, is rendered inapplicable, so as to permit diverse local law to control, in the following situations:

(a) Where the contents of closed receptacles delivered to the redcap constitute salesmen's samples, the actual nature or value of which is not inquired into by the redcap, nor disclosed by the passenger.

(b) Where the railroad station has failed to file a valid tariff schedule with the Interstate Commerce Commission, and also fails to assert the existence of such tariff schedule.

(c) Where, in the absence of a valid tariff schedule limiting its liability, the acts of Respondent's redcap, in relinquishing possession and control of the sample cases and their contents by placing them in a taxi-cab at the request of a stranger, without requiring the surrender of the claim checks, thereby leaving the sample cases at the disposal of the stranger, who was thus enabled to, and who did make away with them, constitute a misdelivery thereof so as to render Respondent liable for the full actual value thereof.

STATUTES INVOLVED.

The pertinent portions of Title 49 U.S.C. Secs. 1(3), and 20(11), are set forth in Appendix C hereto at pp. 10a-12a, and the pertinent portions of Title 28 U.S.C. Secs. 1254(1) 1331, 1332(a)(1) and 1337 are set forth in Appendix C hereto at pp. 13a-14a.

STATEMENT OF THE CASE

This action arose from the loss of a stock of jewelry samples, belonging to Petitioner's assureds, contained in two sample cases, which had been delivered, by one of Petitioner's assureds, to a redcap, employed by Respondent, which owns and operates a railroad station, serving several interstate railroads (App. 13),* and provides, among other services, a redcap service for the handling of property of passengers travelling interstate (App. 43), for which it exacts a separate charge, which was paid (App. 13, 26).

The loss was occasioned by reason of the misdelivery of the sample cases and their contents by the redcap (App. 15, 16).

The amount claimed by Petitioner, as subrogee of its assureds, to whom it had made payment for the loss of said jewelry samples (App. 18), under insurance policies issued by it, was $34,605.88 (App. 18), thus satisfying the jurisdictional requirement prescribed in the statute (28 U.S.C. 1331). Facts are alleged in the complaint (App. 2-6) which gave the District Court below original jurisdiction of the cause (28 U.S.C. 1337). [*Crispin Company* v. *Lykes Bros. Steamship Co.*, 134 F. Supp. 704, 706] Moreover, there is diversity of citizenship between the parties (App. 2), (28 U.S.C. 1332 (a) (1)).

At the time of the delivery of the sample cases and their contents to Respondent's redcap, on September 11, 1955, Petitioner's assured, a travelling salesman holding a ticket for interstate passage to Minneapolis, Minnesota, on the Burlington railroad served by Respondent, told the redcap that the sample cases were valuable (App. 26, 43). The redcap made no inquiry as to the actual nature or

* All similar references are to appendix filed in the Court of Appeals, filed herewith, except as otherwise indicated.

value of the contents of the cases, nor did Petitioner's assured volunteer any disclosure thereof, although the redcap stated, after the event, that he knew, from experience, that Petitioner's assured was a salesman, and that the cases involved contained his salesman's samples (App. 87).

Upon receiving the sample cases the redcap gave Petitioner's assured a claim check for each thereof, by means of which they could be identified (App. 43, 130), and which were required to be surrendered to the redcap as a condition precedent to redelivery thereof to Petitioner's assured aboard the Burlington railroad before its departure from Respondent's station (App. 15).

These claim checks, although having imprinted thereon, among other things, the amount of the charge exacted by Respondent for the service of transporting the cases from the interior of the station to the train (App. 130), in no way indicated any limitation or restriction concerning the nature or value of property which Respondent would undertake to handle, through its redcaps. Neither was there any indication thereon of any limitation or restriction respecting Respondent's liability in the event of the loss of the property entrusted to its redcaps (App. 130); nor was it ever contended that Petitioner's assured was notified or informed of any such limitations, restrictions or conditions, either by the redcap, or by posted signs, or otherwise.

Respondent claimed no limitation of liability by virtue of any tariff schedule filed with the Interstate Commerce Commission.

After Petitioner's assured had delivered the bags to the redcap, a stranger approached the redcap, and upon the pretext of being a brother of Petitioner's assured, stated that they had changed their minds about making the trip (App. 25) and requested that he be given the

sample cases here involved. The redcap explained that the claim checks would have to be surrendered before he could give up the cases (App. 26); nevertheless, when the stranger persisted in his request, the redcap took the sample cases off his truck and carried them to the station taxicab area, and, without requiring the surrender of the claim checks, placed the sample cases in a waiting taxicab, with the stranger inside, who drove off with them (App. 76, 77). Neither the sample cases nor their contents were ever recovered (App. 16).

The case was argued below on two theories: (i) That as a bailee for hire, Respondent was liable for the loss sustained by reason of the misdelivery of the sample cases to an impostor, without requiring the surrender of the claim checks, whether or not Petitioner's assured had disclosed the nature or value of the contents of the cases to the redcap; and (ii) That upon the allegations of the complaint (App. 2-6), [*Crispin Company* v. *Lykes Bros. Steamship Co.*, 134 F. Supp. 704, 706] and the facts adduced in the trial court by way of admissions of Respondent (App. 13-19) the testimony of witnesses, and the deposition of the redcap, read in evidence, the Interstate Commerce Act (49 U.S.C., sec. 1, *et seq.*) applied, and that by reason of Respondent's failure to effect a valid limitation of liability by compliance therewith, its liability for the loss was absolute.

The District Court in dismissing the case after the trial (Appendix B hereto, *infra*, pp. 6a-9a), and the Court of Appeals, in affirming (Appendix A hereto, *infra*, pp. 1a-4a), took the position that the failure of Petitioner's assured to make an unsolicited disclosure of the nature and value of the contents of the sample cases, precluded recovery for the loss.

From the opinions rendered it is apparent that neither the District Court (Appendix B, *infra*, pp. 6a-9a), nor the

Court of Appeals (Appendix A, *infra*, pp. 1a-5a), gave any consideration to the question of whether or not the Interstate Commerce Act (49 U.S.C. sec. 1, *et seq.*) was pertinent or controlling on the governing facts of the case.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it is in direct conflict with the decision of this Court in *New York, N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128, 97 L. ed. 1500.

The factual differences between the two cases, insofar as they as they impinge on the questions here presented are minor; the similarities are clear and important. In the cited case, as in the instant case, there was no disclosure of the contents of the receptacles; no inquiry was made by the redcap with respect thereto; no notice of any limitation of liability was conveyed to the passenger; no "opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge" (*New York, N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128, 135, 97 L. ed. 1500, 1507) was afforded in either case; yet this Court, in the cited case, held there was absolute liability for the actual loss sustained, while the Court below in the instant case denied recovery.

The decision below in effect promulgates additional limitations to the application of the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. sec. 20 (11)) neither contemplated by the Congress (*New York, N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128, f.n. 7, 8, 9, at 132, 97 L. ed. 1500 at 1505), nor capable of being inferred from the plain language thereof (49 U.S.C. sec. 20 (11)), and clothes with apparent validity the untenable proposition that all that need be done to avoid the consequences of the Act in question is either to refrain from

complying therewith, by not filing a valid tariff schedule with the Interstate Commerce Commission, or to fail to urge such a tariff schedule in a case which, upon the facts, is clearly controlled by the Act (*Crispin Company* v. *Lykes Bros. Steamship Co.*, 134 F. Supp. 704, 706).

It is apparent that the court below sought to avoid the issue of the applicability of the Carmack Amendment to the facts of the instant case by reliance on the case of *Michigan Cent. R. Co.* v. *Carrow*, 73 Ill. 348, decided in 1874 before the "Congress superseded diverse state laws with a nationally uniform policy governing interstate carriers' liability for property loss" (*New York, N. H. & H. R. Co.* v. *Nothnagle*, *supra*).

Implicit in the holding of the court below that Respondent's "unwitting possession of the jewelry is an insufficient basis for attaching absolute liability . . .", (253 F. 2d 441, 443) (Appendix A, *infra*, pp. 1a-4a) is the conclusion: That in a case, on its facts obviously arising under an "Act of Congress regulating commerce" (28 U.S.C. 1337), namely, the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. 20 (11)), *no liability attaches* to railroad stations, in the position of Respondent, where property, contained in closed receptacles, and delivered, by interstate travellers, to redcaps employed by such stations, consists of a stock "salesman's samples," rather than "personal effects", *unless* the passenger makes a voluntary disclosure of the nature and value of the property to the redcap, even where no notice of any limitation or restriction is made known to the passenger, or opportunity afforded to choose a higher or lower liability.

In this important aspect the conflict between the decisions of the courts below (Appendix A, *infra*, pp. 1a-5a; Appendix B, *infra*, pp. 6a-9a) and the decision of this

Court in *New York, N. H. & H. R. Co.* v. *Nothnagle, supra,* is real and clear, requiring that this conflict be resolved by this Court.

If, in its consideration of the matter, this Court should conclude that there is no such conflict between the cases as is here urged, it is respectfully submitted that this Court should nevertheless grant certiorari, because, the question of whether or not the Carmack Amendment extends only to certain classes of property delivered to redcaps, in the ordinary course of interstate travel, such as "personal effects", and excludes others such as "salesman's" samples, where the procedures for limiting liability outlined by the Act are not complied with, is a question of great and recurring significance, "beyond the academic or the episodic" (*Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74, 99 L. ed. 897, 901), since it clearly affects a large segment of the travelling public, to-wit, the large number of travelling salesmen, who carry their samples with them, and who usually avail themselves of the redcap service offered by railroad station companies such as Respondent, who serve interstate railroads, and are thus clearly within the purview of the Interstate Commerce Act (49 U.S.C. sec. 1 (3)) and whose liability for loss of property is governed thereby (49 U.S.C. 20 (11)).

The important nature of the question here raised has already been recognized by this Court in *New York, N. H. & H. R. Co.* v. *Nothnagle, supra.* Its full determination by this Court is vital to the effective administration of a "nationally uniform policy governing interstate carriers' liability for property loss" (*New York, N. H. & H. R. Co.* v. *Nothnagle, supra*).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of counsel.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12169 September Term, 1957, January Session, 1958

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff-Appellant,
v.
CHICAGO UNION STATION COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 28, 1958

Before FINNEGAN and HASTINGS, *Circuit Judges*, MERCER, *District Judge*.

FINNEGAN, *Circuit Judge*. Late one afternoon in September, 1955, Mintz, a jewelry manufacturer's representative, went to the Union Station, Chicago, Illinois, to take a train for Minneapolis. When Mintz arrived at the defendant's, (Chicago Union Station Company), railroad station he checked his two sample cases and brown two-suiter bag with defendant's Red Cap No. 71, named Rettig, who gave Mintz three claim stubs for 25¢ each. Mintz, testifying on direct examination, related substantially the following regarding his interchange with Rettig:

> "I told him 'Here are three bags to be loaded on the train for Minneapolis,' and he gave me three

stubs, and I told him to be careful, that they were valuable and to make sure it doesn't roll off the truck, to put it flat, and he said, 'All right; I will claim the checks when you board the train.' I gave him a dollar for the three bags. I think he told me 'Make sure you have your checks with you, because I will call out the number' and I said, 'I know that.' I had no other conversation with the red cap other than that I told him to be careful of the bags and that they were valuable and to make sure the one on wheels don't fall off the truck.

"I left the Red Cap and made a call home. I know a secret door through which I went down to the train to avoid waiting for all the people. I noticed a Red Cap and I asked him if he was Red Cap 71. He was busy unloading and didn't answer. I was first to board the train and I made sure I got the rear seat to reserve space for the bags.

"It was only a few minutes. I asked the porter to see if my bags were on the platform; the man couldn't find it. The train started. . . . When I delivered these bags to the Red Cap on September 11, 1955 they had in them the cases of trays and cases of jewelry, and my watches and there was another case in which the watch cases were."

What subsequently transpired could hardly be controverted by Mintz personally, and, indeed, the following findings of fact are undisputed: "* * * redcap No. 71 had about 27 or 28 bags on his truck, which was a full load. About that time a man approached him and said 'We are not making the trip; we are going to drive up by automobile to Minneapolis.' The redcap inquired as to who was not going to make the trip on the train; and this man said, 'These three bags,' and he pointed out the three bags for which the redcap had issued the three baggage checks. The redcap informed the man that he was required to get the claim checks; and that if he did not turn over the claim checks the man would have to send to Minneapolis for the bags because that is where

they would be. The man replied that his brother had the checks and was telephoning. The redcap gave the . . . man ten more minutes to produce the . . . baggage checks. About five minutes later, the man who wanted the bags taken off the truck . . . returned. . . . Upon being asked where the claim checks were, he said, 'My brother is just finishing his telephone call; he will be here. Will you please bring these bags out to the cab for me?' The redcap directed the man to go to the northside cab court where people ordinarily came into the station instead of the southside cab court where they go out. The redcap then took the three bags covered by the three baggage checks off his truck and carried them to a waiting Yellow cab in the incoming cab stand. The redcap then placed the bag with the wheels on it in the front compartment of the cab; and the man claiming these bags put the suitcase in the rear passenger space of the cab. Then the redcap and the man waited for the return of his brother, who was allegedly telephoning. As the time for the departure of the train was getting very close, the redcap sought to obtain the help of another redcap, either to await the return of the brother or to take the baggage truck of redcap 71 to the train for the delivery of the baggage to the passengers. As the redcap opened the door leading into the train concourse from the cab stand to look for another redcap, he heard the taxicab starting and saw it pull away.

"The three baggage checks were not re-delivered to the said redcap or to any other employee of the defendant; and the said jewelry cases were not recovered by Harry L. Mintz or the plaintiff."

St. Paul Fire and Marine Insurance Company, plaintiff, covered this loss and after paying $34,605.58 to three of its assured, who, including Mintz, owned various pieces of the stolen jewelry, became subrogated to their rights, and as subrogee commenced this action for recovery of the total amount of indemnity paid by it. Plaintiff appealed from judgment for the defendant, and dis-

missal of its case, and now seeks reversal in our court, and, entry of judgment in its favor. No request for a new trial is made. The critical facts are uncontroverted. Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.

Treatise writers display a marked tendency to generalize about bailments and their ideas are apt to reproduce themselves for application in undiscriminating factual situations. Nothing in this shallow evidentiary showing before us establishes defendant's knowledge of the jewelry inventory covertly carried in two cases by Mintz. Defendant's unwitting possession of the jewelry is an insufficient basis for attaching absolute liability on these facts. *Michigan Cent. R. R. Co.* v. *Carrow*, 73 Ill. 348. Bailment is a consensual relation and allowance of recovery, by this plaintiff, would mean holding defendant liable for failure to take precautions with unknown chattels. See *e.g. Crosby* v. *20 Fifth Avenue Hotel Co.*, 173 Misc. 603, 17 N.Y.S. 2d 498 (1940); *Stuart* v. *D. N. Kelly & Son*, 331 Mass. 76, 117 N.E. 2d 160 (1954).

There is, we think, liability for at least the nominal value of the two sample cases *qua cases* (excluding jewelry) and the two-suiter bag and its contents bailed to defendant. *D. A. Schulte, Inc.* v. *North Terminal Garage Co.*, 197 N.E. 17, (1935). But apparently the subrogee-plaintiff only paid out on the value of the lost jewelry and in any event makes no claim for, and hence cannot recover, such nominal damage.

JUDGMENT AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Friday, March 28, 1958
Before
Hon. Philip J. Finnegan, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. Frederick O. Mercer, District Judge

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff-Appellant, vs. CHICAGO UNION STATION COMPANY, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12169	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, WITH COSTS.

IN THE
UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Monday, April 28, 1958
Before
Hon. Philip J. Finnegan, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. Frederick O. Mercer, District Judge

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff-Appellant, vs. CHICAGO UNION STATION COMPANY, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12169	

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX B.

Oral opinion delivered at the conclusion of the trial by District Judge John P. Barnes. (See Appendix filed in Court of Appeals, filed herewith, pages 92-95).

By the Court: * * * As far as I can see, the case before the Court is ruled by this Michigan Central Railroad Company against Carroll in 75 Ill., Page 348.

If I understand the situation with this Union Station Company and railroads and station companies similarly situated they do not hold themselves out as providing ushers to transport currency or jewelry or articles of very great value.

On the other hand, they hold themselves out to transport hand baggage such as those things which are ordinarily carried by travelers, a bag containing some clothes, shoes, maybe some underclothing and a brush and comb and some other things necessary for the traveler to have.

I think it was a constructive fraud on the part of this insured to attempt to carry $36,000.00 worth of jewelry on the train without paying for its carriage and to seek to have it transported by the redcap. I don't think the insured told the redcap, "Be careful of that; it is valuable." That wasn't his state of mind. He probably did tell him, "Be careful; that one case will roll off your truck," but I don't believe he told that redcap that that bag was valuable, because that wasn't the state of mind he was in.

He wanted to carry a valuable lot of merchandise for nothing from Chicago to Minneapolis.

By Mr. Magid: But, your Honor—

By the Court: I never allow anybody to interrupt me. Don't do that.

By Mr. Magid: I thought you were looking at me.

By the Court: I may look at you, but I don't wish you to talk after I start to talk.

By Mr. Magid: I didn't mean to interrupt, your Honor.

By the Court: I think the state of mind of the insured was that he wanted to get his package of jewelry, which he says was worth $36,000.00 from Chicago to Minneapolis without paying what would ordinarily have been the charge for its transportation, the insurance of it against loss.

Therefore, he did not—and I am just as sure of that as I am sure of anything about this case—tell that redcap that that bag was valuable. And when he made his statement on the following Tuesday in the Union Station, he didn't say that he said that, and when we presented his statement to the insurance company, he didn't say that he said that.

The result of that is that I don't think there was a contract of bailment, and further, what happened when that bag disappeared wasn't any different than though it had been taken off by stealth when the usher wasn't about, not a particle of difference.

A man came up and said, "We are not going by train. We are going by automobile. We are going to drive up. My brother is telephoning" and, in effect, he said, "We want to take those bags out to the cab. We are not going by train."

The usher demurred but was persuaded. Here he had a truckload of baggage to go out to the Burlington train, and he thought his customer had changed his mind and didn't want to go by train, so he was torn between a desire to get the baggage to the train and a desire to accommodate these men who had changed their minds and were not going to use the train.

He was tricked into taking the baggage off his truck. He was tricked into putting it into an automobile, and when he turned around to get somebody to watch the merchandise in the automobile or to take the truck to the Burlington train, the purported brother drove off.

I can't see a particle of difference in principle, between that and than if that man or some other man had come up, that alleged brother had came up and by stealth taken the three bags off the truck, not a particle.

He didn't intend to deliver those bags until he got his checks, and they were stolen from him while he was engaged in a natural effort to accomodate accommodating the traveling public.

If the situation were such that I had to render judgment for the plaintiff I would have very great concern, very, very great concern about the amount of that judgment. He says the jewelry, the watches and rings and diamonds and earrings were worth what, $36,000.00?

By Mr. Magid: $34,600 and something.

By the Court: The plaintiff says that?

By Mr. Magid: Yes.

By the Court: There is evidence that the insurance company paid that sum of money to the owner of this property, but the value of that merchandise, if I were called upon to pass on it, it would give me pause. If

I were called upon to say how much he lost, I would be disturbed. He did say that his stock was worth about twenty or twenty-one thousand dollars. He said that on a paper which I think is undated, and he signed it.

That is, the insured signed it, Mintz, and attached to that now are two sheets of paper, not signed by Mr. Mintz, but signed by the firm of insurance adjusters, and when I first heard that paper read, I thought that Mintz was telling the value of the goods, the value of all the goods in his cases.

At any rate, I don't have to worry about that. I don't think there can be any recovery, and I don't think there should be any recovery, but if there were to be recovery, I tell you I would be disturbed about the amount of any recovery in excess of twenty or twenty-one thousand dollars.

I don't think it is necessary to say anything else unless there is some matter I have overlooked and I should cover, and you may call my attention to it.

By Mr. Magid: Anything else might be construed as an argument. I don't mean to argue with the Court.

By the Court: That is the best I can do with it, gentlemen.

APPENDIX C.

49 U.S.C. Chapter 1,—Transportation—Section 1, par. (3) #1, par. (3) Definitions.

§ 1, par. (3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

• • •

49 U.S.C. Chapter 1,—Transportation, Section 20 (11)

§ 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation, from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign

country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is

sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation.

• • •

28 U.S.C., Chapter 81, Supreme Court—Jurisdiction, Section 54.

§ 1254 (1) Courts of Appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

• • •

28 U.S.C., Chapter 85, District Courts—Jurisdiction, Section 1331.

§ 1331. Federal question; amount in controversy

The district courts shall have the original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930.

28 U.S.C., Chapter 85, District Courts—Jurisdiction.

Section 1332

§1332 (a)(1)—Diversity of Citizenship; amount in controversy.

(a)(1) The district Courts shall have original jurisdiction of all civil actions in which the matter in controversy exceeds the sum or value of $3,000 exclusive of interests and costs, and is between:

(1) Citizens of different States;

• • •

28 U.S.C., Chapter 85, District Courts—Jurisdiction, Section 1337.

§ 1337. Commerce and anti-trust regulations

The district courts shall have the original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 211

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioner,

vs.

CHICAGO UNION STATION COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

Petitioner's jurisdictional statement cites the Interstate Commerce Act (49 U.S.C. 1, *et seq.*) and statutory provisions for federal question and commerce jurisdiction (28 U.S.C. 1331, 1337). These statutes were not pleaded or otherwise raised in the trial court, where petitioner waived any right to recover on a federal or commerce ground as shown in this brief. Only diversity of citizenship, which is alleged in the complaint, is a relevant ground of federal jurisdiction at this stage of the case.

QUESTIONS PRESENTED.

Petitioner's statement of questions presented (pp. 2-3) is misleading and based on a false analysis of the case. According to the petition, the question is whether the Carmack Amendment to the Interstate Commerce Act does not apply here "so as to permit diverse local law to control". This is contrary to petitioner's position in the trial court. Petitioner there insisted that local law did control and, in claiming that respondent is not a carrier, claimed that the Carmack Amendment did not apply. Petitioner has therefore waived, as argued in this brief, any right to recover under the question now claimed to be presented. There are other errors in petitioner's statement of the questions presented:

(a) In saying that the redcap did not inquire into the nature and value of the contents of the traveling bags, petitioner wrongly assumes that the redcap had a duty to make such an inquiry, whereas the relevant court decisions indicate the traveler had a duty to disclose this information.

(b) In saying that respondent "failed" to file a tariff schedule with the Interstate Commerce Commission and "failed to assert the existence of such tariff schedule", petitioner wrongly assumes that respondent had a duty to do so, although no such duty was alleged or otherwise urged by petitioner in the trial court.

(c) In treating as open the question of whether the redcap's placing of the bags in the taxicab constituted a "misdelivery", petitioner overlooks the trial court's holding that the bags were stolen from the redcap (Pet. App. 8 a).

On the record the only reviewable questions are: (1) did the trial court correctly find as a fact that petitioner's assured did not inform the redcap that the bags contained jewelry? and (2) did the trial court and the Court of Appeals rightly hold that this was a constructive fraud on respondent, was negligence by the assured, and precluded recovery by petitioner under Illinois law? (App. 97, 100).

RESTATEMENT OF THE CASE.

The statement of the case in the petition is inaccurate and argumentative.

Petitioner filed suit as subrogee in the District Court to recover $34,605.88 which it had paid as an alleged insurance loss to the owners of jewelry. The significant facts are fairly stated as follows (references are to the trial court's findings, App. 96-99, as well as the testimony):

One of petitioner's assureds, Harry Mintz, was a jewelry salesman. On Sunday, September 11, 1955, he went to the Union Station (owned and operated by respondent) in Chicago at about 4:25 in the afternoon to take a 5:00 o'clock train for Minneapolis (App. 96). Mintz delivered three traveling bags to a redcap, an employee of respondent, to be returned to Mintz at the train (App. 26, 74). One bag was a suitcase, and two were sample cases containing the jewelry for which petitioner later paid the alleged $34,605.88 loss. The redcap gave Mintz three claim checks. As found by the trial court, Mintz did not tell the redcap or any other employee of respondent that the sample cases were valuable or contained jewelry (App. 97).

At about 4:40, when the redcap had a full load of bags on his truck, a man approached him and said, "We are not making the trip; we are going to drive up by automobile to Minneapolis" (App. 75). The redcap asked who was not making the trip, and the man replied, "These three bags", pointing to Mintz' bags. The redcap said he had to get the claim checks, and the man replied that his brother had them and was telephoning (App. 76, 97). Five minutes later the same man came to the redcap again, said he and his brother were in a hurry, that his brother was finishing the phone call and would be there, and asked the redcap to take the three bags to the taxicab stand. The redcap did so, placing the bags in a taxi that drove up (App. 75-76, 97-98).

The redcap and the man were standing, waiting for the return of the man's alleged brother, when the redcap was summoned on the station's loudspeaker to deliver his other baggage. The redcap wanted the help of someone who would either take the baggage truck to the train or watch the man (App. 77, 83, 98). As the redcap opened the door leading into the train concourse to look for another redcap, he heard the taxicab start and, turning, saw it pull away (App. 77, 98). The baggage checks were not redelivered to the redcap or any other employee of the respondent. The jewelry cases were never recovered by Mintz or petitioner.

After a trial in the District Court without a jury, the trial judge gave an oral opinion (App. 92-96) and entered findings of fact, conclusions of law, and a judgment for respondent (App. 96-100). There were findings that both parties contended that the relationship involved was a bailment and that Illinois law governed (App. 99); that respondent held itself out to provide ushers to carry baggage ordinarily carried by travelers but not currency or jewelry or articles of great value (App. 99);

that the jewelry in Mintz' bags was a stock-in-trade carried for exhibition and sale (App. 99); that Mintz did not tell the redcap that the sample cases contained jewelry of great value (App. 97); that a bailment was not created (App. 99); and that Mintz committed a constructive legal fraud and was guilty of negligence in not telling the redcap of the jewelry in his baggage (App. 100). The Court of Appeals affirmed.

Petitioner's statement of the case says (p. 4) that Mintz "told the redcap that the sample cases were valuable", citing Appendix 26 and 43. This is Mintz' testimony which the trial judge emphatically stated he did not believe (App. 93). The trial judge also disbelieved the claim that the lost jewelry was worth $34,500, for at one time Mintz had stated in writing that the value was $20,000 or $21,000 (App. 95).

Petitioner says (p. 6) the redcap put the bags in the taxi "with the stranger inside". The cited record references (App. 76, 77) do not support the statement at all and show that the redcap and the stranger were standing together after the bags were put in the taxi.

Petitioner attempts to create the impression that this case was tried as a claim under the Carmack Amendment to the Interstate Commerce Act. Petitioner devotes much space (p. 5) to a discussion of the claim checks, saying that neither they nor any other notice limited respondent's liability. Petitioner says that the case "was argued below" on two theories, and the second is described as absolute liability under the Interstate Commerce Act as a result of respondent's alleged failure "to effect a valid limitation of liability by compliance therewith". As shown in this brief, petitioner itself rejected any such basis of recovery by contending in the trial court that the respondent was not a carrier. So, when peti-

tioner says (pp. 6-7) that neither the District Court nor the Court of Appeals considered the relevancy of the Interstate Commerce Act, petitioner is complaining of what it itself induced the District Court to do, *i.e.*, decide the case under the state law of bailments and not the federal law of carriers.

REASONS FOR DENYING WRIT.

Petitioner seems to argue two grounds for granting the writ. It is said, first, that the decision of the Court of Appeals is on a federal question and in conflict with the decision of this Court in the *Nothnagle* case, 346 U.S. 128 (1953). And it is argued that the case presents an important question under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. 20 (11). Both contentions were waived in the trial court and are wholly unsound. This case was rightly decided below, and no question involved meets the high standards set by this Court in exercising its power to review. Petitioner's contentions are also based on a misunderstanding of the facts, the holdings of the two lower courts, and applicable legal principles.

1. Petitioner is estopped to assert liability under the Carmack Amendment.

Petitioner itself contended in the trial court that the law of bailments of the State of Illinois governed the transaction and that respondent is not a carrier. Now petitioner contends that respondent is a carrier liable under a federal law, the Carmack Amendment, 49 U.S.C. 20 (11), which imposes liability on a "common carrier, railroad, or transportation company subject to the provisions" of Part I of the Interstate Commerce Act. Petitioner's waiver of the federal basis of liability was not

by an isolated statement but by a repeated course of conduct.

In the complaint filed August 27, 1956, no federal statute was cited or referred to. The allegations were sufficient (App. 2) to show diversity of citizenship. There was no allegation that respondent is a carrier or is engaged in interstate activities.

As the trial opened on June 5, 1957, petitioner's counsel stated, "This action can be generally described as a bailment action". (Appellee's App. 1 a). Two days later, while the trial was still in progress, petitioner's counsel said that the law applicable to the case is "the law of the State of Illinois" under *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (Appellee's App. 1 a). On the same day he said he agreed with respondent's counsel that the *Carrow* case, 73 Ill. 348, is the law of Illinois "and the law of the State of Illinois that applies"; and he explained that in referring to interstate commerce cases he had "simply pointed those cases out to your Honor to show even in the tariff cases . . . that the Supreme Court has said the passenger does not stand in the same relation to a situation as the railroad company" (Appellee's App. 1 a, 2 a). Petitioner thus persistently urged the trial court to decide the case according to the Illinois law of bailments.

On June 18, 1957, the court's findings and conclusions included a finding that both parties contended that the Illinois law of bailments governed the transaction (App. 99).

On June 26, 1957, petitioner filed a motion to set aside the findings, incorporated proposed findings, and also made a motion for a new trial (App. 100-119). These papers did not dispute the court's finding that the transaction was governed by the Illinois law of bailments (cf. App. 99, 107-108). Nor did they claim that the respondent

was a carrier or was liable to petitioner under the Interstate Commerce Act. In fact petitioner expressly stated that defendant was not a carrier and that Illinois law governed. For petitioner's motion said, "it is agreed that the law of Illinois governed the transaction" (App. 108). The motion also said:

> "Defendant is not a carrier. Admittedly it was an ordinary bailee for hire, hence it can neither claim the privileges and immunities of a carrier, nor is it saddled with the obligations of a carrier" (App. 108).

Petitioner's motions requested the trial court to find that the redcap knew that the sample cases were valuable, that the relationship between the salesman and respondent was that of bailor and bailee for hire, that there was a "misdelivery . . . and . . . in legal effect a conversion of the sample cases and their contents" making the respondent liable irrespective of negligence, that the misdelivery of the cases and their contents was the sole and proximate cause of their loss (App. 113, 116, 117).

After oral arguments on September 11, 1957, petitioner's motions were denied (App. 120, 121).

Petitioner thus induced the trial court to disregard both the state and federal law of carriers and decide the case by the state law of bailments. If the law of carriers or the Carmack Amendment were really applicable, petitioner misled the trial court into treating the relation as that of bailor and bailee. And petitioner also misled the respondent. Since petitioner sought recovery under the law of bailments, respondent made no effort to show that it is not a common law carrier or that it or this transaction is not within the language of the Carmack Amendment ("Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation, from a

point in one State . . . to a point in another State . . .''). See *Horelick* v. *Pennsylvania R. Co.*, 24 N.J.S. 413, 94 A. 2d 685 (1953), aff'd, on other grounds, 99 A. 2d 652, 655, holding that a station company such as respondent is not a carrier under the Carmack Amendment.

The Court of Appeals, as indicated by its opinion, decided the case as one involving the law of bailments and cited the *Carrow* case for a statement of the applicable legal principle (Pet. App. 4 a). The Court of Appeals thus followed what the record indicated to be the governing law.

Many decisions show that petitioner by its conduct has waived the right to assert liability under the state or federal law of carriers and is estopped to raise it. In *Minneapolis & St. Louis R.R. Co.* v. *Winters*, 242 U.S. 353, 356 (1916), the railroad did not object to the trial court's conclusion that the plaintiff employee was working in interstate commerce, and the case was decided under the Federal Employers' Liability Act. In holding that the railroad could not raise questions inconsistent with liability under the statute, Mr. Justice Holmes commented:

> ". . . even if the courts and parties were wrong about the proper basis for the suit that fact does not entitle the defendant to have the judgment reversed. It cannot complain of a course to which it assented below."

In *Petersen* v. *Chicago, Great Western Ry. Co.*, 138 F. 2d 304, 307 (C.A. 8, 1943), a passenger sought damages in a Nebraska federal court for an injury in Iowa and the case was tried on the assumption that Iowa law applied. It was held that the principles of "practical estoppel" prevented the plaintiff on appeal from contending that Nebraska law governed. In *Corbin* v. *B. & O. R. Co.*, 234 F. 2d 78, 81 (C.A. 6, 1956), the appellant discarded the

theory on which he tried the case and substituted a contradictory theory on appeal. The court said that "a party cannot be permitted to take advantage of errors which he has, even in good faith, invited or induced the district court to make". In *Gilby* v. *Travelers Ins. Co.*, 248 F. 2d 794, 797 (C.A. 8, 1957), where the record did not show that a matter had been raised in the trial court, it was said that the trial court, "having had no opportunity of passing upon the question now for the first time presented," could not be "charged with error in failing to do that which it was not requested to do". See also *New York, etc. Railroad Co.* v. *Estill*, 147 U.S. 591, 615 (1893).

Petitioner's waiver is not based on mere failure to plead jurisdiction based upon a federal question, as was claimed in the *Crispin* case, 134 F. Supp. 704, 706, relied on in the petition (p. 6). Here petitioner in the District Court sought to impose liability on one ground and expressly disclaimed another ground. And now on appeal the disclaimed ground is solely urged.

2. Respondent was rightly held not liable regardless of whether state or federal law governs.

While petitioner has waived the Carmack Amendment as a basis for liability as shown above, it is also true that respondent would not be liable under either the Carmack Amendment or common law carrier principles if they had been raised. In other words, even if it were an error for the trial court not to consider the Illinois or federal law of carriers, the error was harmless and is not ground for reversal.

The outstanding feature of this case is that petitioner's assured (Mintz) concealed from respondent the fact that his bags contained jewelry samples of great value. The trial court so held. Yet petitioner (p. 4) continues

to rely on Mintz' testimony at the trial that he told the redcap that the bags were valuable. Petitioner thus seeks to raise a disputed question of fact on certiorari. But the trial judge indicated his strong disbelief in Mintz' testimony on this and other points. The trial judge said in his oral opinion that Mintz "did not—and I am just as sure of that as I am sure of anything about this case—tell that redcap that that bag was valuable" (App. 93), and the written findings stated that Mintz ". . . did not inform the said redcap, or any other employee of the defendant, that the two black sample cases contained jewelry" (App. 97).

The trial judge concluded that Mintz was negligent in failing to disclose the contents of the bag. At one point the trial judge said that Mintz was guilty of gross negligence in "giving a $36,000 bag to a redcap in the Union Station without telling him what it is" (App. App. 3 a). Mintz' purpose, the trial judge said, was to get the jewelry from Chicago to Minneapolis without paying the ordinary transportation charge (App. 93). The trial judge's written conclusions said that the failure of Mintz to inform the respondent and its employees of the inclusion of the jewelry in the bags was "a constructive legal fraud" upon the respondent, and that Mintz "was guilty of negligence in failing to make such disclosure" (App. 100).

The conduct of Mintz was the legal cause of the loss. It is true that the redcap placed the bags in the taxi, but he did not voluntarily give up the bags without return of the claim checks. While he was waiting for the checks and was starting to the station concourse to get help, the bags were stolen from him. As said in the trial judge's opinion, the result was the same as if the man had "by stealth taken the three bags off the truck" (App. 94).

A judgment for the respondent necessarily followed whether the applicable law is the Illinois common law of bailments or carriers or the common law of carriers as codified in the Carmack Amendment to the Interstate Commerce Act.

(a) Under the *law of bailments,* which petitioner exclusively relied upon in the trial court, petitioner was unable to prove a cause of action because Mintz failed to tell the redcap that the bags contained jewelry of great value. "Since . . . the duties . . . of a bailee cannot be thrust on a person without his knowledge or consent, it is essential to a bailment that there be an acceptance of the subject matter by the bailee" (8 Corpus Juris Secundum 249). Here the $34,000 worth of jewelry was never accepted by respondent as bailee since Mintz did not reveal the contents or value of the bags to the redcap or any other agent of respondent.

This result is made clear by the early Illinois ruling in *Michigan Central R. Co.* v. *Carrow,* 73 Ill. 348 (1874), cited by the parties and the two lower courts in the case at bar. There a jewelry salesman's samples, worth about $30,000, were shipped by railroad in a trunk. The baggage car caught fire, and the contents were destroyed. The passenger sued the railroad in an action on the case. The railroad was held not liable under either the law of carriers or bailments. The court's full discussion of non-liability under the law of bailments (pp. 355-360) emphasized the failure of the passenger to inform the defendant of the valuable contents of the trunk. The opinion contained much language directly relevant here, including statements that there was no contract of bailment since the goods had been placed in the defendant's possession without its knowledge and consent and that the bailor's want of fair dealing was a full answer

to an action on an implied contract of bailment for hire (p. 357). The opinion also commented (p. 358) that the most that could be said was that the defendant was "a bailee without reward, as to the contents of . . . (the) trunk" so that it was "only obligated to slight care and could only be answerable for gross neglect". The evidence was then discussed, with the conclusion that the company was not guilty of gross negligence.

In the case at bar there was thus no bailment for hire while the redcap had the bags. The trial judge indicated that the only gross negligence in the record was that of Mintz (App. App. 3 a) in giving bags worth thousands of dollars to a redcap without telling him what they were. The redcap was not an armed guard hired to prevent the theft of valuables. So far as he knew, the bags contained only things of ordinary value that would not be stolen by an elaborate device such as that used here. He was merely performing his duties when he took the bags to the cab stand, placed them in the taxi, and stepped to the door of the station to get the help of another redcap. As the trial judge held, the redcap did not intend to deliver the bags until he got the claim checks, and the bags were stolen from him while he was engaged in the natural act of accommodating a traveler (App. 94). The legal fault that caused the loss of the bags was the negligence or fraud of Mintz, the traveler, and of course the theft by the stranger. Petitioner thus was unable to recover under the Illinois law of bailments.

(b) The same result follows under the *common law of carriers*, which generally imposes the high obligations of an insurer on the carrier when property is placed in its care by a shipper. Here Mintz' conduct would relieve

respondent of liability even if it were a carrier. The relevant common law principle is stated in 13 Corpus Juris Secundum 146:

> "Where the shipper either by his acts or his omissions fraudulently conceals the nature or the value of the goods shipped, the effect of such conduct is to relieve the carrier from its liability as insurer; . . . Thus, it has either been held or said in a number of decisions in which the goods shipped were money, jewelry, or other valuables so concealed as to hide their value and mislead the carrier, that the latter is discharged absolutely from any liability for loss or injury to such property; and this rule is particularly applicable if the loss is due to the carrier's omission of such precautions as were necessary to the safe transportation and delivery of the goods, superinduced by the shipper's fraudulent conduct."

In the *Carrow* case noted above, in discussing the carrier's liability, the Illinois Supreme Court explained that, while the trunk appeared to be that of a commercial traveler, the carrier's employee had no reason to suspect that it contained valuable jewelry and that the law imposed no obligation on the carrier to make inquiry as to the contents (73 Ill. at p. 351). The court also emphasized that the carrier's strict liability as an insurer is not imposed when the shipper fails to inform him of the value of the goods (pp. 351, 352):

> "Common carriers are compelled, by the nature of their vocation, to transport goods for all classes of people, and while they are, for politic reasons, to be held to the strict liability of insurers of the parcels intrusted to their care, the law imposes the duty upon the owner to act with common honesty. He will not be permitted to practice any imposition upon the carrier, or delude him as to the nature and

> value of the goods to be transported. The authorities on this branch of the law are quite numerous, and it is not necessary to do more than to cite a few of them. 2 Kent, 603 and 604; Story on Bailments, sec. 565; . . ."

Another clear illustration of the common law rule is *Humphreys* v. *Perry*, 148 U.S. 627 (1893). A traveling salesman for a jewelry firm shipped jewelry worth $10,000 in a trunk from Springfield to Petersburg, Illinois. Through the railroad's negligence the baggage car caught fire, and the contents of the trunk were destroyed. Recovery of the value of the jewelry was sought in a railroad receivership pending in a federal court in Illinois. Again the court's full opinion contains much relevant language on the failure of a passenger to inform the carrier of the value of the trunk's contents. For that reason the railroad was held not liable. Many authorities were discussed, including a statement from Story on Bailments that the person sending goods by a carrier has a duty "to make use of no fraud or artifice to deceive him, whereby his risk is increased, or his care and diligence may be lessened" and any such fraud or unfair concealment would exempt the carrier from responsibility "or, more properly speaking, it will make the contract a nullity" (p. 641-2).

Here, as in the *Carrow* and *Humphreys* decisions, both of which cite many similar cases, the traveling salesman's concealment of the facts concerning the contents of the bags greatly increased the likelihood of theft by stealth or even armed robbery. Under the common law of carriers, respondent was in these circumstances not liable as an insurer even if otherwise the relationship of carrier and shipper existed between it and Mintz. Respondent was relieved of liability under the principle, as stated in the *Carrow* case, 73 Ill. at 360, that

". . . the passenger, who has the information, should apprise the company of the extraordinary value of the package he desires to have checked as baggage, and, upon failure to do so, if loss ensues, he must bear the consequences".

(c) This same common law principle is incorporated into the *Carmack Amendment* to the Interstate Commerce Act. The relevant language of section 20(11), which was in the statute when originally enacted in 1906 (34 Stat. 584), is that the carrier is liable to the shipper "for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered . . ." The petition for certiorari treats the Carmack Amendment as if it imposed a complete and unlimited liability on the carrier except as modified by a tariff. This interpretation was rejected long ago.

In *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 506-7 (1912), it was contended that the words "any loss, damage or injury" meant that "an absolute liability exists for every loss, damage or injury, from any and every cause". But it was held that the statute "plainly implies a liability for some default in its common law duty as a common carrier". See also *Missouri, Kansas & Texas Ry. Co.* v. *Harriman*, 227 U.S. 657, 672 (1913).

In *Boh Bros. Const. Co.* v. *Perry Heavy Haulers*, 72 F. Supp. 102, 104, aff'd 166 F. 2d 719 (C.A. 5, 1948), where a shipper sued under the Carmack Amendment for damage to the shipment and the carrier claimed the loss was caused by the shipper's improper loading, the trial court said the Carmack Amendment did not make the carrier an "absolute insurer" and had not changed the "common law doctrine in respect to a carrier's liability for loss occurring on its line". The common law was

said not to create liability when the damage arises from "acts of the shipper". In affirming, the Court of Appeals said the "fault of the shipper exonerated the carrier".

Recently, in *Secretary of Agriculture* v. *United States*, 350 U.S. 162, 165 n. 9 (1956), the opinion said the Carmack Amendment "codified the common-law rule making the carrier liable without proof of negligence for all damage to the goods transported by it, unless it affirmatively shows that the damage was occasioned *by the shipper,* acts of God, the public enemy, . . ." (Italics added).

The Carmack Amendment, which thus continues the common law principle that the carrier is not liable for damage caused by the act of the shipper, necessarily incorporates the rule of the *Humphreys* case cited above, 148 U.S. 627, that a carrier is not liable for loss of baggage containing valuable jewelry when the shipper conceals the contents of the baggage. Here, treating Mintz as a shipper and respondent as a carrier subject to the Carmack Amendment, his failure to inform the redcap of the contents of his bags with an increase in the risk of loss shows that the loss was caused by the shipper rather than by the carrier.

Thus respondent would have been held not liable even if the petitioner had sought in the trial court to impose a carrier's liability on respondent under the Carmack Amendment and even if the respondent and the carrying of bags by redcaps were within the coverage of the Carmack Amendment.

It is significant that petitioner does not cite a single case in which, at common law or under the Carmack Amendment, a traveler was allowed recovery when he failed to disclose the extraordinary value of the con-

tents of his bags. It is this controlling fact in the case at bar that clearly differentiates the 4 to 3 decision in *Araje* v. *Pennsylvania R. Co.*, 251 N.Y. 354, 167 N.E. 497 (1929), which petitioner emphasized in the Court of Appeals. There a trunk checked as passenger's baggage contained a stock-in-trade of linens and laces. A value of $2500 was declared by the passenger, and he paid an extra charge for excess value. The trunk was lost. In suing, the passenger alleged the value to be $12,500 (see 223 N.Y.S. 544) but only the $2500 declared value was sought to be recovered. The railroad defended on the ground that its tariff schedule provided only for carrying personal effects and salesmen's samples as passenger's baggage so that carriage of the stock-in-trade was contrary to its tariff. The majority opinion explained that it was not clear that the tariff provision had been violated; there was no fault on the passenger's part since the facts did not clearly show that he should have known that merchandise could not be carried as baggage; that there was no fraudulent concealment by the passenger; and that a holding of liability was not contrary to the decision in the *Humphreys* case. Unlike the *Araje* case, the plaintiffs in *Humphreys* and the case at bar sought to recover the great value of objects which were concealed from the defendants.

The case at bar was thus correctly decided by the District Court and Court of Appeals whether one approaches the case from the direction of the state or federal law of bailments or carriers.

3. The holdings below are not inconsistent with New York, N.H. & H.R. Co. v. Nothnagle, 346 U.S. 128 (1953).

Most of petitioner's argument (pp. 7-9) is devoted to an attempt to show that the holding for respondent is in "direct conflict" with the *Nothnagle* case. Since that

is a Carmack Amendment case, petitioner has clearly waived any right to use it as a precedent as shown above. And it is also clear that the holding for respondent has an entirely different basis, both factual and legal, from anything involved in *Nothnagle*.

In *Nothnagle* a passenger traveling from Connecticut to Massachusetts gave her suitcase, at an intermediate transfer point, to a redcap who was a railroad employee. The suitcase vanished. The passenger sued for damages in a Connecticut court. Most significantly, *the railroad admitted liability*. For the railroad stipulated that the bag and contents were worth $615 and "were lost due to petitioner's negligence" (346 U.S. at p. 129). The railroad defended on the ground that its tariff filed with the Interstate Commerce Commission limited its liability to $25 unless the passenger had declared a higher valuation. The state courts and, on the railroad's application for certiorari, this Court ruled that the limitation of liability in the tariff was not a defense because the value had not been declared by the shipper or agreed on in writing as required by the Carmack Amendment.

The initial question of the carrier's liability for loss of the goods was thus stipulated out of the *Nothnagle* case. In contrast, in the case at bar, the two lower courts have held that respondent is not liable because the loss was caused by the passenger's own act. If the limiting of liability were a question in the case at bar, it has never been reached because there is no liability to be limited.

Petitioner (p. 7) says that in *Nothnagle* "there was no disclosure of the contents of the receptacles" and that "no inquiry was made by the redcap with respect thereto". That was not stated in the Supreme Court's opinion. The stipulated value of the contents ($615) indicates that they probably consisted of personal effects.

And, since the railroad stipulated to its own liability, the concealment or inquiry as to the contents of the bag was immaterial. In contrast, the concealment of jewelry samples worth over $30,000 was a crucial fact in the case at bar under settled principles of the law of bailments and carriers.

Petitioner argues that the courts below have created "additional limitations to the application of the Carmack Amendment" which the *Nothnagle* case said were not intended by Congress; and that the law of the *Carrow* case, 73 Ill. 348, decided in 1874, and relied on in the courts below, has been superseded by Congress "with a national uniform policy governing interstate carriers' liability for property loss". Petitioner overlooks what was done by the Carmack Amendment to achieve national uniformity concerning one aspect of property loss, *i. e.*, the initial question of the carrier's liability. The "nationally uniform policy governing interstate carriers' liability for property loss" (*Nothnagle*, p. 131) takes the form in the Carmack Amendment of "the liability imposed by the common law upon common carriers" (*Mo. Kan. Ry.* v. *Harriman*, 227 U.S. at 672). The decisions of the courts below in the present case are in full accord with this congressional policy.

Petitioner's misunderstanding of the *Nothnagle* case is related to its misunderstanding of the Carmack Amendment. Petitioner wrongly assumes that the Carmack Amendment imposes the absolute liability of an insurer on the carrier whether the loss is caused by an act of the shipper or the public enemy or an act of God. Petitioner then concludes that the *Nothnagle* case indicates that a tariff limitation is the only possible means for the carrier to escape full liability. On the contrary, the opinion in the *Nothnagle* case (p. 133 n. 7) itself

recognized that under some circumstances the carrier would not be liable under the Carmack Amendment, for the court described the full recovery contemplated by Congress as arising "under such circumstances as to make the carrier liable". All the *Nothnagle* case stands for is that if there is liability under the Carmack Amendment the liability cannot be limited to an arbitrary figure without informing the passenger of the limitation. That result is not relevant to any issue in the case at bar.

CONCLUSION.

The contentions now made by petitioner were waived by it in the trial court. Petitioner's arguments for granting the writ ignore crucial findings of fact in the trial court and the relevant legal principles. The decision sought to be reviewed is not in conflict with the *Nothnagle* or any other federal case and is in accord with the polity and language of the Carmack Amendment to the Interstate Commerce Act.

Respondent urges that the writ of certiorari be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 211

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioner,

vs.

CHICAGO UNION STATION COMPANY,

Respondent.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

Respondent's Brief in opposition to the Petition for Certiorari (pp. 1-10) concerns itself mainly with the contention that petitioner has waived its right to urge that the courts below erred in failing to construe the Interstate Commerce Act (Title 49 U.S.C.A. Secs. 1(3), 20 (11)) as pertinent and controlling on the governing facts of this case, on the ground that Petitioner failed to urge this issue in the trial court.

The record refutes this contention, since it shows that the issue was so urged.

In the Appendix filed on behalf of plaintiff in the Court of Appeals, containing portions of the record of this cause in the trial court, copies of which were filed with the Petition for Certiorari herein, the following finding of fact was submitted to the trial court by plaintiff (App. 116, Fol. 424):

> "1. That defendant makes no claim of limitation of its liability for the loss of the receptacles and their contents delivered to its red caps by reason of any tariffs filed in compliance with any requirements of the Interstate Commerce Act, and that none was filed pursuant thereto."

The trial court rejected this proposed finding (App. 121).

The excerpt from the trial court record, set forth at folio 391, page 1a of Appellee's Appendix following Appellee's Brief in the Court of Appeals, (copies of which were filed with the Petition for Certiorari herein), also shows that the question of the applicability of the Interstate Commerce Act, was urged in the trial court.

Respondent's counsel there stated:

> "Mr. Roepher: I don't know whether counsel has been attempting to convert this case from a State case to an Interstate Commerce case * * *"

It is apparent, from the submitted finding and from the statement of Respondent's counsel set forth above, that the question of whether Respondent's liability was governed by the pertinent sections of the Interstate Commerce Act (Title 49, U.S.C.A., Secs. 1(3), 20(11)), was urged in the trial court, and that no waiver thereof occurred, as sug-

gested by Respondent. This conclusion is inevitable if any purpose is to be ascribed to the foregoing record references.

II.

Respondent's contention, at page 1 of its Brief in opposition, that the failure of Petitioner to plead either the Interstate Commerce Act (Title 49 U.S.C.A. Secs. 1(3), 20(11)), or the "statutory provisions for federal question and commerce jurisdiction" (Title 28 U.S.C.A. Secs. 1331, 1337 respectively), constituted a waiver of its right to "recover on a federal or commerce ground", is contrary to established law, as shown by the following decisions.

In *Banks* v. *King Features Syndicate, Inc.*, (SD NY 1939) 1 FR Serv. 8a 32, Case 1, the court stated:

> "It is not necessary to allege the different statutes or constitutional provisions, for the court will take judicial notice of them."

In *Crispin Company* v. *Lykes Bros. Steamship Co.*, 134 F. Supp. 704, the court said at page 706:

> "When facts are alleged which bring the statute into play, a specific reference to it is unnecessary and immaterial. *Great Northern Ry.* v. *Galbreath Co.*, 271 U.S. 99, 46 S. Ct. 439, 70 L. Ed. 854; *McGoon* v. *Northern Pac. Ry.*, D.C. 204 F. 998, and cases there cited."

The allegations of the Complaint (App. 2-6) clearly set forth facts which bring the Interstate Commerce Act "into play." The essence of the Complaint is: Petitioner's assured delivered property to Respondent, which operates an interstate railroad passenger terminal in Illinois, to be redelivered to him aboard a train departing therefrom

for Minnesota, which was not done, to Petitioner's resultant damage.

Title 49 U.S.C. Sec. 1(3), defines "railroads" to include:

> ". . . terminals, and terminal facilities used or necessary in the transportation of the persons or property designated herein . . ."

Section 20(11) of Title 49 U.S.C. includes railroads as defined in Section 1(3) cited above.

We submit therefore that the allegations of the Complaint, (which recite the delivery of property to Respondent for purposes clearly incident to interstate commerce, in which activity Respondent is obviously engaged), bring the Interstate Commerce Act "into play", and disclose a controversy dependent for its outcome upon a construction of the Interstate Commerce Act.

III.

Since the Complaint (App. 2-6) discloses a controversy dependent for its outcome on a construction of the Interstate Commerce Act, the failure of the courts below to construe the act as applied to the facts, and to grant recovery, constitutes a manifest error of law.

In *Kansas City, St. L. & C. R. Co.* v. *Alton R.R. Co.*, (7 Cir.) 124 F. 2d 780, the Court correctly applied the established doctrine, stating (p. 785):

> "(2) If the appellant has stated a cause of action for any relief, it is unimportant what he designates it, or what he has asked for in his prayer; the Court will grant him the relief to which he is entitled under the facts pleaded. Par. (c) of Rule 54, Federal Rules of Civil Procedure, 28 U.S.C.A. following No. 723c."

Thus even if the Complaint upon which Petitioner proceeded below did not refer to the Interstate Commerce Act as a basis for recovery, the Court nevertheless had a duty to construe and apply the same to the facts, and to grant relief thereunder.

In *Gins v. Mauser Plumbing Supply Co.*, 148 F. 2d 974, 976, the Court stated (p. 976):

> ". . . When the parties are at issue, . . . particular legal theories of counsel yield to the Court's duty to grant relief to which the prevailing party is entitled, whether demanded or not. Federal Rules of Civil Procedure, Rule 54(c) . . ."

IV.

It is respectfully submitted that whether plaintiff below did or did not proceed upon the theory that the controversy required a construction of the Interstate Commerce Act, the important and exceptional nature of the instant case warrants that this Court grant the Writ and reach the merits of this cause, for the reasons set forth at pages 7-9 of the Petition filed herein.

Ample support for the foregoing is contained in:
Hormel v. Helvering, 312 U.S. 552, 557, 61 S. Ct. 719, 721, 85 L. Ed. 1037, 1041 where Mr. Justice Black, speaking for the Court, stated:

> ". . . There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See *Blair v. Oesterlein Mach. Co.*, 275 US 220, 225, 72 L. Ed. 249, 252, 48 S. Ct. 87".

and in the Memorandum of Mr. Justice Frankfurter to the opinion of this Court in *Kerman* v. *American Dredging Co.*, (1958) 355 U.S. 426, 441, 2 L. ed. 2d 382, 400, 78 S. Ct. 394, 408, where it is stated:

> "This is a case which involves a serious question of the construction of a statute of nationwide importance. Such questions of construction are among the most important issues for final determination by this Court."

V.

The core of Respondent's argument (at pages 10 to 18 of its Brief in opposition) is that, even under the Interstate Commerce Act, the failure of Petitioner's assured to make an unsolicited disclosure of the nature and value of the contents of the sample cases, delivered to the red cap employed by Respondent, precludes recovery on the ground that such failure to disclose occasioned the loss.

We submit first that the misdelivery of the sample cases and their contents to an impostor, by Respondent's red cap, without requiring the surrender of the claim checks, can under no circumstances be attributed to the failure to disclose the nature and value thereof. Secondly, such a construction of the Interstate Commerce Act is not only contrary to the express provisions of the Act (Title 49 U.S.C.A. Sec. 20(11)), which prescribes the means by which Respondent could have avoided the absolute liability imposed thereby (which it failed to do), but is contrary to the decision of this Court in *New York, N.H.* v. *H.R. Co.* v. *Nothnagle*, 346 U.S. 128, 97 L. Ed. 1500.

We submit that this erroneous construction of the Interstate Commerce Act, urged by Respondent, as an operator of a large railroad passenger terminal serving four inter-

state railroads (App. 13, Fol. 19A), clearly indicates the importance of the question here involved, and the need for a full determination thereof by this Court, in order to insure the application of a nationally uniform policy governing interstate railroads' liability for property loss (*New York, N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128, 97 L. ed. 1500), and to avoid injustice.

CONCLUSION.

For the reasons stated in the Petition and this Reply, it is respectfully submitted that a Writ of Certiorari should be granted in this cause.

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